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No. 79-1269

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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INTERNAL REVENUE SERVICE, PETITIONER

*v.*

SUSAN B. LONG and PHILIP H. LONG

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

STUART A. SMITH
*Assistant to the Solicitor General*

JONATHAN S. COHEN
MURRAY S. HORWITZ
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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The Solicitor General, on behalf of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The district court's order granting partial summary judgment (App. A, *infra*, 1a-17a), its memorandum and order on documents (*id.* at 18a-25a), and its order on motions (*id.* at 26a-28a) are not officially reported. The opinion of the court of appeals is reported at 596 F.2d 362 (App. B, *infra*, 29a-44a). The

court of appeals' per curiam order denying the government's petition for rehearing (App. C, *infra*, 45a-46a) and its order rejecting the government's suggestion for rehearing en banc (App. D, *infra*, 47a) are not officially reported.

## JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 48a-49a) was entered on May 2, 1979. A timely petition for rehearing was denied on September 27, 1979 (App. C, *infra*, 45a-46a). By order dated December 13, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to February 18, 1980 (a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the source documents of the Internal Revenue Service's Taxpayer Compliance Measurement Program, which are used to establish that agency's audit selection formulae, are protected from disclosure under the Freedom of Information Act as material "related solely to the internal personnel rules and practices of an agency" (Exemption 2) or as "investigatory records compiled for law enforcement purposes * * * that * * * disclose investigative techniques and procedures" (Exemption 7 (E)).



## STATUTE INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552, are set forth in Appendix F, *infra*, 50a-60a.

## STATEMENT

1. Respondents brought this action under the Freedom of Information Act, 5 U.S.C. 552, in the United States District Court for the Western District of Washington, to compel the Internal Revenue Service to disclose various documents pertaining to its Taxpayer Compliance Measurement Program (TCMP). Specifically, respondents sought the production of (a) reports and analyses; (b) statistical compilations; (c) records outlining the statistical design; and (d) source documents. After commencement of the action, the Internal Revenue Service made available to respondents all requested records except the source documents (App. A, *infra*, 2a; App. B, *infra*, 30a).

The parties joined issue in the district court with respect to the disclosure of the TCMP source documents (App. A, *infra*, 3a; App. B, *infra*, 30a). The TCMP is a statistical investigatory technique devised by the Internal Revenue Service and put into operation in 1962 in order to measure the level of compliance with the federal tax laws (App. B, *infra*, 30a; III-R. 668).[1] Under the TCMP, a random sample of 50,000 tax returns is selected for intensive audit. The

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[1] "R." refers to the six volume duplicated record filed in the court of appeals. For the convenience of the Court, we are lodging a copy with the Clerk.

information on the tax returns and the tax changes determined by the TCMP audits are thereafter entered on "checksheets" and computer data tapes (I-R. 22-23; App. A, *infra*, 3a).

The information collected from the various returns subjected to TCMP audit forms the statistical data base of the Internal Revenue Service's discriminant function scoring system. This system is used to assign ratings or "score" individual and corporate tax returns in order to identify those returns that have a high tax change potential. The discriminant function scoring system is developed from correlations between the amount of audit change and the items appearing on the returns subject to TCMP audit. There is a high statistical probability that returns receiving a high score, based upon the use of the discriminant function formulae, have a substantially greater potential than other returns for tax change if selected for audit. Accordingly, the formulae are a valuable objective enforcement technique employed by the Service to select for audit the returns of those persons who are most likely to have understated their tax liability (III-R. 670).

Respondents sought the production under the Freedom of Information Act of the TCMP source documents. Those documents consist of the computer data tapes and those individual checksheets that are necessary to interpret the tapes. The tapes contain the identical tax and audit information as the checksheets, except that the taxpayer's name and address are not on the tapes. Respondents did not demand



the identities of individual taxpayers but requested that such identifying information be deleted (App. B, *infra*, 30a-31a).

2. The district court granted summary judgment for the government as to the TCMP "checksheets" and data tapes. That court ruled that the material was "specifically exempted from disclosure by statute" pursuant to Exemption 3 of the Freedom of Information Act on the ground that the checksheets and computer data tapes were "returns" within the meaning of 26 U.S.C. (1970 ed.) 6103 and 7213 and 18 U.S.C. 1905 (App. A, *infra*, 6a-7a). The court further found that the TCMP source material constituted "returns" barred from disclosure whether or not the taxpayer identity information was deleted and that, at all events, the deletion of the taxpayer identifying features would be so time-consuming and expensive as to be "as a matter of law unreasonable" (*id.* at 8a).[2]

3. Subsequent to the district court's decision, Exemption 3 of the Freedom of Information Act and 26 U.S.C. (1970 ed.) 6103 were both amended. The parties agreed, and the court of appeals held, that the case was governed by the amended versions of the statutes (App. A, *infra*, 32a & n.2). The court of appeals reversed and remanded the case for further proceedings (App. B, *infra*, 29a-44a).

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[2] The district court ordered limited discovery to allow respondents the "opportunity to reasonably identify those 'reports and analyses * * * [and] records outlining the statistical design' of the [TCMP]" (App. A, *infra*, 14a).

The principal change in 26 U.S.C. (1970 ed.) 6103 was the addition of the so-called "Haskell amendment," which added a gloss to the definition of "return information." It provides that "return information" (which is prohibited from disclosure) "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" (26 U.S.C. 6103(b)(2)).[3] Since respondents sought production of the TCMP source documents with the taxpayers' identities deleted, the court of appeals held that the explicit language of the Haskell amendment permitted the disclosure of the material as edited.

In so ruling, the court rejected the government's argument, which relied upon a floor statement by Senator Haskell, that the amendment was not intended to encompass edited versions of audit results but simply sought to codify the existing Internal Revenue Service practice of disclosing statistical data that contain easily deletable identifying information (App. B, *infra*, 38a-41a). As the court saw the matter, "the [Haskell] amendment demonstrate[d] a purpose to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach" (App. B, *infra*, 41a). The court

[3] Exemption 3 of the FOIA was amended to require that the statute prohibiting disclosure either require that the matters be withheld in such a manner as to leave no discretion on the issue, establish particular criteria for withholding, or refer to particular types of matters to be withheld (see App. F, *infra*, 57a). See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 (1975).



acknowledged, however, that "[s]ome useful information which does not identify particular taxpayers may nonetheless be exempt from disclosure under the FOIA by virtue of * * * exemption 7(E) [which] permits withholding of investigating records compiled for law enforcement purposes [if production would] disclose investigative techniques and procedures" (App. B, *infra*, 41a n.6). Nevertheless, the court did not address the applicability of Exemption 7(E) because "the IRS ha[d] not raised any other exemption[] which might prevent disclosure of this information" (*ibid.*).

Finally, the court of appeals observed that "[t]he district court did not point to any public harm which will result from disclosure, other than the expense and inconvenience involved" (App. B, *infra*, 43a). As the court of appeals summarized its ruling, "We believe that in view of the usefulness of the information, the strong congressional policy favoring disclosure, and the apparent congressional willingness to impose substantial costs on agencies in the interest of public access to information, the costs and inconvenience in this case are not alone sufficient to require nondisclosure" (*ibid.*).[4]

[4] The court of appeals remanded the case to the district court for further proceedings with respect to three issues. It directed the district court to "determine whether disclosure of TCMP source data entails a significant risk of indirect identification" (App. B, *infra*, 38a). It also instructed the district court to consider respondents' request for an order enjoining the Service from further withholding of similar materials, and their claim for costs and attorney's fees (*id.* at 43a-44a).

4. The court of appeals denied the government's petition for rehearing and its suggestion for rehearing en banc (App. C, *infra*, 45a-46a; App. D, *infra*, 47a). In its petition for rehearing the government pointed out that the court of appeals had misapprehended the potential for public harm that would result from disclosure of the TCMP source documents. Specifically, the government urged that (page 4)[5]—

> The panel decision poses a severe threat to the Service's ability to administer the tax laws. If the TCMP source documents are released, outside parties could prepare and publish close approximations of the discriminate function (DIF) formulas used by the Service to select tax returns for audit. Once the formulas are made public, persons could modify their returns and thereby substantially reduce the likelihood of audit. This in turn would disrupt the effectiveness of the audit process by rendering useless the procedures now used to select for audit those returns having a high probability of significant tax change. [Footnote omitted.]

The court of appeals refused to consider the damage to the administration of the revenue laws that disclosure would cause because it "was not previously raised in arguments before [it] and [because] it was not adequately presented before the district court either" (App. C, *infra*, 45a). It therefore denied rehearing on the ground that "the factual assertion

[5] For the convenience of the Court, we are lodging a copy of the government's petition for rehearing with the Clerk.



raised by the IRS in its petition [was] not timely" (*id.* at 46a).

## REASONS FOR GRANTING THE PETITION

1. The disclosure of the documents ordered by the decision below threatens to destroy the efficacy of one of the Internal Revenue Service's most important investigative techniques in enforcing the tax laws. The court of appeals' refusal to consider the public harm to the administration of the revenue laws that will result from publication of the material at issue therefore urgently requires the intervention of this Court.

As this Court recognized in *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975), "our tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." The voluntary compliance that is at the heart of our system of tax administration is enhanced by the knowledge of each potential taxpayer that the Internal Revenue Service has the statutory authority to investigate and audit "persons * * * who may be liable" for taxes (26 U.S.C. 7601). Of course, the Service lacks the resources to audit all of the returns filed each year. The general audit program involves approximately two million returns. Accordingly, the Internal Revenue Service developed the Taxpayer Compliance Measurement Program (TCMP), an objective investigative technique de-

signed to select for audit the returns of those persons who are most likely to have understated their tax liability.

The vast majority of all returns selected for audit are identified by means of the TCMP. If the TCMP source documents at issue in this case are released, outside parties could prepare and publish close approximations of the audit selection formulae used by the Service to identify returns of those persons who are likely to have understated their tax liability. Once the formulae are made public, persons could easily modify their returns in response to the audit selection criteria and thereby virtually insulate themselves from scrutiny under the general audit program. Since disclosure in the instant case will spell the end of the TCMP, the important questions under the Freedom of Information Act that the court of appeals refused to consider will never be able to be presented in a subsequent case. The far-reaching impact of the judgment of the court of appeals upon the Internal Revenue Service's ability to enforce the tax laws in a fair and even-handed manner calls for review by this Court.

2. a. The decision below orders disclosure of computer tapes containing the items on the face of the returns and the related adjustments of the 50,000 individual income tax returns subject to TCMP audit. The taxpayer identifying information has been removed from this material. But as we have pointed out (*supra*, pages 3-4), the unique and sensitive nature of the data contained on the tapes arises from



the fact that the Internal Revenue Service develops its audit selection formulae from correlations between the items on the face of the returns and adjustments made in these 50,000 TCMP audits. These formulae enable the Service to "score" by computer every return filed and select the approximately two million returns for audit that offer the greatest statistical likelihood for determination of deficiencies in tax liability. Indeed, the importance of the audit selection formulae is demonstrated by the fact that for fiscal year 1975 approximately 70% of all of the returns audited (1.3 million of 1.8 million) were selected under the TCMP system. See Report to the Joint Committee on Internal Revenue Taxation, Congress of the United States, *How the Internal Revenue Service Selects Individual Income Tax Returns for Audit* 12 (Nov. 5, 1976).

The Commissioner of Internal Revenue has advised us that if the decision below stands requiring the disclosure of the data base from which the audit selection formulae are developed, a competent statistician could reasonably approximate the audit selection formulae. While it is unlikely that the formulae could be duplicated exactly, they could be reproduced with a sufficiently high degree of accuracy to enable taxpayers to structure their returns to avoid a high selection score and thereby insulate themselves from audit through the computer selection system. The resulting damage to the Internal Revenue Service's audit program and the integrity of the self-reporting tax system therefore cannot be overstated. Disclosure of the

data base sought by respondents would provide taxpayers with a statistical roadmap for tax avoidance. Accordingly, the Service's ability to select returns for audit efficiently and on an objective basis would be severely compromised.

b. Although the foregoing considerations of the public harm to the administration of the revenue that would result from disclosure of the TCMP documents were brought to the attention of the court of appeals, it refused to consider them on the ground that "[t]his contention was not previously raised in arguments before this court, and it was not adequately presented before the district court either" (App. C, *infra*, 45a). It therefore "conclude[d] that the factual assertion raised by the IRS in its petition is not timely" (*id.* at 46a).

In important respects, however, quite the contrary is true. In a supplemental memorandum filed in the district court in support of its motion for summary judgment, the government urged that "disclosure could severely hamper the Internal Revenue Service's efforts to administer the internal revenue laws" (III-R. 646) (see generally *id.* at 638, 646-647). The fact that the district court did not address these concerns but held for the government on the ground that the TCMP source documents were "returns" under 26 U.S.C. (1970 ed.) 6103 and therefore "specifically exempted from disclosure by statute" under Exemption 3 of FOIA merely reflected the applicability of another basis of decision under the then-existing statutes.



When the case was presented to the court of appeals, the parties principally focused on the effect of the Haskell amendment to 26 U.S.C. (1970 ed.) 6103, which excluded from the definition of "return information" "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" (26 U.S.C. 6103(b)(2)). While this language appeared to support respondents' claim that the deletion of the taxpayer identifying information removed the TCMP source documents from the compass of Exemption 3, the government argued that the sole purpose of the Haskell amendment was to codify the Internal Revenue Service's existing practice of disclosing statistical compilations. The authority for this interpretation was a statement by the author of the provision, Senator Haskell, that "the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure, will not prevent disclosure" (122 Cong. Rec. 24012 (1976)).

Although we continue to believe that our interpretation of the Haskell amendment is correct and supported by legislative history of the most authoritative character, we do not ask this Court now to review the court of appeals' adherence to the literal language of that provision and its rejection of the applicability of Exemption 3 to the TCMP source documents. Our purpose in describing the details of our Exemption 3 argument is simply to show that the government ad-

vanced in the court of appeals a solid basis for affirmance of the district court's holding that disclosure was barred by statute even after enactment of the Haskell amendment. The availability of that argument appeared to make it unnecessary to urge that disclosure would also breach the security of the Service's audit selection program.

To be sure, the benefits of hindsight suggest that the government should have given greater emphasis in the court of appeals to the alternative contention that disclosure would pose a severe threat to the Internal Revenue Service's ability to administer its audit program. But that argument was squarely presented to the court of appeals at the petition for rehearing stage. There was accordingly no bar to its consideration as "not timely," as the court of appeals suggested (App. C, *infra*, 46a). Indeed, as long as the government raised the issue "prior to the petition for certiorari" (*Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977)), it can properly be considered by this Court as well as by the courts below in any further proceedings ordered by this Court.

3. Given the public importance of the issue in this case, we submit that there are serious questions under FOIA that should be considered in the first instance by the courts below. These issues are fairly encompassed within our claim in both courts below that disclosure of the TCMP source documents will destroy the efficacy of the Service's audit selection pro-



gram—even though that claim, regrettably, did not refer specifically to Exemption 2 or Exemption 7(E).

a. *Exemption 7(E).* The Internal Revenue Service documents appear to fit within the terms of Exemption 7(E) of FOIA which bars the production of "investigatory records compiled for law enforcement purposes * * * that * * * disclose investigative techniques and procedures" (5 U.S.C. 552(b)(7)(E)). While two circuits have held that this exemption applies only to records compiled in the course of a specific investigation (*Cox* v. *United States Dept. of Justice*, 576 F.2d 1302, 1310 (8th Cir. 1978); *Cox* v. *Levi*, 592 F.2d 460, 462 (8th Cir. 1979); *Sladek* v. *Bensinger*, 605 F.2d 899, 903 (5th Cir. 1979), petition for rehearing pending), a recent district court decision has held that portions of the State Department's Foreign Affairs Manual pertaining to the Secret Service's methods for identifying individuals who may pose threats to government officials are exempt under 7(E) (*Zamnik* v. *Department of State*, No. 79-1072 (D.D.C. Aug. 28, 1979)). At all events, the fact that the TCMP source documents contain data derived from audits of actual taxpayers suggests that this material may constitute records compiled in the course of specific investigations. Finally, the Eighth Circuit in *Cox* has indicated that "information that would impede law enforcement efforts" (576 F.2d at 1309) is not subject to FOIA disclosure as "administrative staff manuals and instructions to staff that affect a member of the public" (5 U.S.C. 552(a)(2)(C)). See also 592 F.2d at 463 & n.9.

In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 n.30 (1975), this Court held that the lower courts could consider on remand an Exemption 7 claim despite the government's initial failure to assert it in the district court. As the Court stated, "a court of equity may always amend its decree on a proper showing * * * [of] an injury to [the agency's] functions of the type sought to be prevented in Exemption 7, resulting from the disclosure of * * * particular [documents]." Here, the government timely argued to the district court that disclosure would endanger the Service's audit selection program (albeit without relying specifically on Exemption 7). It follows a fortiori that the lower courts can consider and vindicate the government's Exemption 7 claim in this case. Cf. *Jordan* v. *United States Dept. of Justice*, 591 F.2d 753, 779 (D.C. Cir. 1978) (en banc); *Ryan* v. *Department of Justice*, No. 79-1777 (D.C. Cir. Jan. 7, 1980), slip op. 19, petition for rehearing pending on another issue.

b. *Exemption 2.* There is likewise a compelling case for exemption from disclosure of the TCMP source documents as "matters that are * * * related solely to the internal personnel rules and practices of an agency" (5 U.S.C. 552(b)(2)). As this Court observed in *Dept. of Air Force* v. *Rose*, 425 U.S. 352, 364 (1976), there have been cases interpreting Exemption 2 as "permitting agency withholding of matters of some public interest * * * only where necessary to prevent the circumvention of agency regulation that might result from disclosure to the subjects



of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function" (citations omitted). Indeed, in terms that strikingly bear upon the consequences of disclosure in this case, this Court in *Rose* further suggested that Exemption 2 may well apply "at least where the situation is * * * one where disclosure may risk circumvention of agency regulation" (*id.* at 369).

Since *Rose*, two circuits have held that Exemption 2 "prevents the forced disclosure of [law enforcement manuals that] * * * would * * * significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection" *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978). Accord: *Cox* v. *United States Dept. of Justice*, 601 F.2d 1, 4 (D.C. Cir. 1979). See also *Ginsbury, Feldman & Bress* v. *Federal Energy Administration*, Civ. No. 76-0027 (D.D.C. June 18, 1976), aff'd per curiam by an equally divided court, 591 F.2d 752 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979); *Sturgeon* v. *Dept. of Treasury*, Civ. No. 77-1961 (D.D.C. Jan. 30, 1979). Cf. *Cox* v. *Levi*, *supra*, 592 F.2d at 462; *Jordan* v. *United States Dept. of Justice*, *supra*, 591 F.2d at 763-771; *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787, 797 (6th Cir. 1972), second appeal on remand, 507 F.2d 481 (1974); *Stokes* v. *Brennan*, 476 F.2d 699, 703 (5th Cir. 1973). It is therefore clear that there is a strong basis for the applicability of Exemption 2 to the TCMP source documents at issue in this case.

c. We recognize that this Court may not wish to address the applicability of Exemptions 7(E) and 2 of FOIA in the absence of any resolution of the merits of these claims by the district court or the court of appeals. "[W]ithout a lower court opinion on the[se] legal issue[s]," this Court "normally decline[s] to consider a legal claim" in the first instance. *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 164. See also *Ramsey* v. *Mine Workers*, 401 U.S. 302, 311-312 (1971). But the damage to the Internal Revenue Service's administration of the tax laws resulting from disclosure is simply too severe to permit the decision below to stand by default without adjudication of the questions that the court of appeals erroneously brushed aside as "not timely" (App. C, *infra*, 46a). Since the court of appeals remanded the case to the district court for further proceedings to consider three additional issues (see page 7, note 4, *supra*), we believe that the appropriate disposition would be for this Court to grant certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals with instructions that it direct the district court to consider as well the claims that disclosure is barred by Exemptions 2 and 7(E) of FOIA. In these circumstances, it would not be necessary for the Court to set the case for plenary review and oral argument.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

STUART A. SMITH
*Assistant to the Solicitor General*

JONATHAN S. COHEN
MURRAY S. HORWITZ
*Attorneys*

FEBRUARY 1980

**APPENDIX A**

U.S. DISTRICT COURT
WESTERN DIST. OF WASHINGTON

Civil No. C75-228S

June 1, 1976

SUSAN B. LONG and PHILIP H. LONG, PLAINTIFFS

*v.*

U.S. INTERNAL REVENUE SERVICE, DEFENDANT

Susan B. Long, Philip H. Long, pro se.

Tax Div., Dept. of Justice, U.S. Atty., W. Dist. of Wash., for Defendant.

McGOVERN, Chief Judge:

Order Granting Partial
Summary Judgment

This Matter comes on for hearing before the undersigned Judge in the above-entitled Court upon defendant's Motion for Summary Judgment of dismissal and upon plaintiff's Motion for Partial Summary Judgment.

This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, as amended by Public Law 93-502 in 1974, to gain the release of all the information gathered by the defendant in the Individual Returns Filed Phase (Phase III), Corporate Returns Filed Phase (Phase IV), and Delinquent Returns Phase (Phase II) of the Taxpayer Compliance Measurement Program (hereafter referred to as "TCMP"). TCMP is a continuing series

of scientific studies conducted by defendant on a massive scale to measure the level of federal tax compliance in the United States. In the language used by plaintiffs to describe the "records" sought, plaintiffs seek the production of

> 4. . . .
>
> (a) reports and analyses
> (b) statistical compilations
> (c) records outlining the statistical design (both planned and achieved)
> (d) source documents including forms, cards, tapes and other data storage media . . . .

relating to phases II, III, and IV of the TCMP.

Defendant in its Answer and more recently in support of its Motion for Summary Judgment asserts that, save and except for the material requested in Paragraph 4(d) of the Complaint, all other requested "records" known to it to exist have been made available to the plaintiffs. Plaintiffs vigorously, if not voluminously, contest such an assertion. Defendant claims an exemption from disclosure only of 4(d) material under FOIA, 5 U.S.C. § 552(b)(3) and under 26 U.S.C. § 6103, 26 U.S.C. § 7213, and 18 U.S.C. § 1905.

The Court having heard oral argument in this matter, having read all the records and files herein, and having reviewed all the exhibits submitted herein, concludes for the reasons stated below that the material requested in Paragraph 4(d) of the Complaint is exempt from disclosure. The Court further concludes that the defendant has produced all statistical



compilations of the TCMP and therefore is entitled to partial summary judgment of dismissal as to the documents requested in Paragraph 4(b).

## I. "Source" Material Requested Is Exempt Under Exemption 3.

Plaintiff's Motion for Partial Summary Judgment raises a single legal issue, that is, whether the "source" material of the TCMP is properly disclosable under FOIA. The Court holds that it is exempt. The material being requested here is in the form of "checksheets" and data tapes. TCMP checksheets are the basic source documents used by defendant's agents in the field to identify the taxpayer by name, address and social security number, and to reflect data reported by the taxpayer on his return:[1] Space is provided on the checksheets for additional comments from the field.[2] The information obtained from the checksheets, with the exception of the taxpayer's name and address, is eventually entered onto computer data tapes. Defendant's estimate that the checksheets number in excess of 200,000 stands uncontroverted.[3] The computer data tapes and the check-

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[1] Affidavit of Hearl C. Kuykendall, dated February 10, 1976 and filed March 16, 1976.

[2] See Exhibits A through F attached to Affidavit of Norman Fox, Chief of Operational Research Section, Planning Branch, Audit Division, I.R.S., dated February 24, 1976 and filed May 1, 1976 as attached to defendant's Memorandum in Response to the Order of the Court dated February 10, 1976, in both Long cases C75-131S and C75-228S.

[3] Affidavit of Hearl C. Kuykendall, Note 1, supra.

sheets make up in substance the raw data from which the statistical compilations are produced. Plaintiffs do not controvert defendant's assertion that all the statistical compilations from all phases and cycles of the TCMP have been made available to plaintiffs. These statistical tabulations number one million, three hundred and thirteen thousand, five hundred and nineteen pages (1,313,519) and are located in defendant's National Office in Washington, D.C.[4] Plaintiffs concede that they have not yet attempted to review these documents which have been available for plaintiffs' inspection since approximately May 9, 1975.

Defendant claims an exemption from disclosure of the checksheets and computer data tapes. Defendant argues, among other things, that such a request requires the defendant to create a new document, which defendant is not required to do under FOIA. Defendant also asserts that such raw data is exempt from disclosure under 5 U.S.C. § 552(b)(3) which states:

> (b) This section does not apply to matters that are . . .
>
> (3) Specifically exempt from disclosure by statute . . . .

The government goes on to cite Sections 6103 and 7213 of the Internal Revenue Code and the criminal provision contained in 18 U.S.C. 1905 as prohibiting disclosure of tax return information to the public.

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[4] See defendant's Answer to Complaint, dated May 9, 1975.



Plaintiffs urge the Court in their Motion for Partial Summary Judgment to require the defendant to delete all information contained in the "source" material which tends to identify the taxpayer or which is an "identifying detail" and to order the rest of the material disclosed. The Court concludes that such a request goes far beyond the requirements of FOIA.

The Freedom of Information Act requires disclosure of identifiable records on demand unless such records explicitly fall within one of the Act's exempt categories. NLRB v. Sears, Roebuck and Co., 421 U.S. 132 (1974). The enumerated exemptions are to be narrowly construed. Department of the Air Force v. Rose, —— U.S. ——; 44 L.W. 4503 (April 21, 1976). The Court has not been cited to any case law which includes in its definition of "records" under FOIA the computer tapes or anything similar thereto which plaintiffs now seek to have copied and turned over to them. Even if the Court was to find that "records" under the Act could be stretched far enough to include computer data tapes, which in the Court's opinion it cannot, the computer tapes, checksheets, and other source material are exempt from disclosure by other statutory authority and thus are exempt under Exemption 3 of the Act. 5 U.S.C. § 552(b)(3).

The United States Supreme Court in Federal Aviation Administrator v. Robertson, 422 U.S. 255 (1974) clearly established that the intent of Congress under FOIA was not to modify existing statutes restricting public access to specific government records. The Court stated therein

> . . . Nothing in the Act or its legislative history gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection . . . .

(422 U.S. at 262.)

The Court went on to conclude that Congress in adopting Exemption 3 in the Act intended

> . . . to permit the numerous laws then extant allowing confidentiality to stand; it is not for us to override that legislative choice.

(422 U.S. at 266.)

There can be no question that under the other statutory authority cited by defendant, 26 U.S.C. § 6103 and § 7213, the disclosure of taxpayer returns and abstracts of information obtained therefrom is unlawful except in limited circumstances specifically set forth in the statutes. The mere fact that the IRS is authorized to release some information or source data under these statutes or appropriate regulations has no bearing on the question now before the Court —whether FOIA requires the disclosure of all the raw data sought in Paragraph 4(d). It is apparently conceded by plaintiffs that the raw data they seek is taken directly from taxpayers' returns and reflected on the checksheets and computer data tapes. It must be conceded therefrom that such checksheets and computer data tapes constitute "returns" under the meaning of 26 U.S.C. § 6103 and § 7213 and 18 U.S.C. § 1905. The definition of "returns" under the Code of Federal Regulations would include the "source"



material sought by plaintinffs.[5] Where, as here, disclosure of such material is prohibited by statute and under penalty of law except in the discretion of the Secretary of the Treasury or Commissioner of Internal Revenue, the disclosure obligation of FOIA "does not apply" [6] to those documents under Exemption 3. F.A.A. v. Robertson, supra.

The plaintiffs suggest that merely by removing those portions of the checksheets and computer data tapes which contain information on the taxpayer's identity, the material can be disclosed pursuant to FOIA, citing Department of the Air Force v. Rose, —— U.S. ——; 44 L.W. 4503 (1976). The Court disagrees. Air Force v. Rose dealt with Exemption 6 and disclosure of Air Force Academy Cadets' personnel files and not with Exemption 3 and the Internal Revenue Code. It is true that the 1974 Amendments to FOIA call for the disclosure of "[a]ny reasonably segregable portion of a record . . . after deletion of *the portions which are exempt under this subsection.*" 5 U.S.C. § 552(b) (emphasis supplied). It is this Court's opinion, however, that under Exemption 3 of the Act, all portions of the checksheets and computer data tapes are exempt because they constitute "returns" barred from disclosure under Sections 6103 and 7213 of the Code whether or not redaction of taxpayer identity information is made. Even if plaintiffs' argument was correct that removal of taxpayer

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[5] See definition of "return" found in 26 C.F.R. § 301.6103 (a)—1(a) (3) (i).

[6] See NLRB v. Sears, 421 U.S. 132 at 137 (1974).

identifying information from the raw data took the "source" material outside the statutory bar disclosure, Section 6103 and 7213 of The Internal Revenue Code and 18 U.S.C. § 1905, it is clear that in the absence of such redaction, the material is exempt from disclosure. The question thus turns on whether the defendant has a duty under FOIA to excise the identification information from all "source" material sought in this case. For the reasons set forth below, the Court holds that defendant has no such duty.

The Court finds that the nonexempt material contained in those "source" documents is not "reasonably segregable" from the confidential portions which identify the taxpayer. The Court has reviewed blank checksheets similar to the completed ones sought by plaintiff. A tremendous expense and great number of man-hours would be required to excise from the raw materials all identifying features and taxpayer information. See the uncontroverted affidavits of Hearl C. Kuykendall, dated February 10, 1976 and January 13, 1976 and filed March 16, 1976 wherein Mr. Kuykendall estimates that over 200,000 checksheets exist, and that it would cost over $160,000.00 to produce clean copies of the checksheets and computer data tapes. The Court is convinced that the magnitude of time and expense required to "sanitize" the TCMP source material prior to disclosure is as a matter of law unreasonable.

In addition, the Court finds that to effectively shield the taxpayer identification information from plaintiffs, the defendant would be forced to create a new



document or data tape in place of the old. This the Freedom of Information Act does not require. The appropriate standard to be applied here was set forth in NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 162 (1974):

> . . . [The Act] only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. Sterling Drug Inc. v. FTC, 146 U.S. App. D.C. 237; 450 F.2d 698 (1971).

Here the law has not required and the agency clearly does not desire to create checksheets and data tapes completely free of all confidential taxpayer identification information.

The Supreme Court in Air Force v. Rose, was not faced with such a massive reconstruction process as would be required here should disclosure of the raw "source" material be required. Mr. Chief Justice Burger, in his dissent in that case, saw clearly that the language in Air Force v. Rose requiring deletion of names and identifying characteristics from personnel and medical files in some cases to serve the purposes of Exemption 6, could not be extended to a case such as the instant case (44 L.W. at 4513). This Court will not extend the language of Air Force v. Rose to require the deletion here of confidential information from all "source" material exempt in the absence of such redaction under Exemption 3 of FOIA.

Finally, in balancing the equities as to plaintiffs' 4(d) request for "source" material, and after much consideration of both the plaintiffs' and the public's interest in this matter, the Court concludes that equity does not require the disclosure of the raw data check-sheets and computer tapes. See GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). In sum and substance, plaintiffs already have access to the same information, to be found in the statistical tabulations derived completely from the taxpayer raw data. It is from the statistical compilations and *not* the raw data that defendant analyzes the Service's effectiveness in insuring taxpayer compliance with our tax laws. The reports and analyses which plaintiffs also seek interpret and concern *not* the "source" material, the check-sheets or computer data tapes, but the statistical compilations from TCMP. The time and expense that would be required to remove the confidential material, the disruption of the IRS computer center and of IRS manpower that would be caused by such an effort, as established uncontrovertably by the affidavits of defendant's employees submitted herein,[7] outweigh what limited benefit, if any, plaintiffs stand to gain by disclosure of the additional information.

For all of the above reasons, plaintiffs' Motion for Partial Summary Judgment is denied.

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[7] See affidavits and exhibits in support of defendant's Motion for Summary Judgment, filed March 16, 1976.



## II. TCMP Statistical Tabulations Requested Have Been Provided.

In Paragraph 4(b) of their Complaint, plaintiffs requested disclosure of statistical tabulations. Defendant's response to this request in its Answer, that all the statistical compilations have been made available to plaintiffs, continues to remain uncontroverted. The Court having read the records and files herein, finds there remains no genuine issue of material fact as to whether defendant has fully complied with the requirements of the Freedom of Information Act in making available the TCMP statistical tabulations. The Court concludes that defendant is entitled to partial summary judgment of dismissal as to plaintiffs' 4(b) request.

## III. TCMP Records Requested In Complaint, Paragraph 4(a) and 4(c).

As to the remaining requests of plaintiffs contained in Paragraph 4(a) and 4(c) of the Complaint, specifically, "(a) reports and analyses" and "(c) records outlining the statistical design (both planned and achieved)" in the TCMP, Phases II, III, and IV, there exists substantial disagreement between the parties on (1) whether such requests reasonably identify documents in defendant's possession and (2) whether defendant has disclosed all documents, reasonably identified, which are within the scope of this action and which are known to the defendants. The Court shall not grant defendant's Motion for Summary Judgment as to Paragraph 4(a) and 4(c) of the

Complaint, having been presented with conflicting affidavits on the questions of compliance with FOIA and unavailability of the requested documents, particularly where the necessary information may be in the exclusive possession of the agency. National Cable Television Association, Inc. v. F.C.C., 479 F.2d 183, 190 (D.C. Ct.App. 1973). Defendant's Motion for Summary Judgment of dismissal as to records requested in plaintiffs' Complaint, Paragraph 4(a) and 4(c) therefore is denied.

However, the Court does find that plaintiffs have failed to reasonably identify the documents they seek to have disclosed by way of Paragraph 4(a) and 4(c) of their Complaint, and which they claim have not yet been disclosed as required by FOIA. Recognizing that plaintiffs now claim to be operating under some disadvantage because of their asserted lack of knowledge of the identity of the remaining records sought and not yet disclosed, the Court will permit plaintiffs limited discovery, pursuant to the Court's Order entitled "Order For Limited Discovery" dated this date and attached hereto. This limited discovery shall provide plaintiffs a final opportunity to correct their present failure to reasonably identify those TCMP reports and analyses and records outlining the statistical design of TCMP which exist and have not been disclosed. The Court will not tolerate any delay by either party in completing the discovery now being permitted by said Order on discovery. In this discovery, the plaintiffs are to be concerned only with discovering the reasonable identity of documents now



broadly described in 4(a) and 4(c) of the Complaint and not, as defendant has termed it, the "wastepaper" of the entire TCMP operation. Plaintiffs shall narrow the area of their inquiry to the remaining scope of this action as defined below. To that end and in an effort to bring this litigation to a speedy conclusion, the Court hereby identifies and defines the remaining scope of this action, adopting in part the language of plaintiffs set forth in Plaintiffs' Response to Defendant's Supplemental Memorandum of March 31, 1976:

> Plaintiffs' requests for those yet undisclosed TCMP reports and analyses, and records outlining the statistical design shall hereafter be limited to: "reports [defendant] has prepared which contain the analysis of [the statistical tabulations of TCMP, Phases II, III, and IV, already produced by defendant]" which reports present the "actual findings" and "factual impressions" of the defendant arising from said statistical tabulations and relating to the Taxpayer Compliance Measurement Program, Phases II, III, and IV.

Now, Therefore,

It is hereby

Ordered that plaintiffs' Motion for Partial Summary Judgment be and the same is Denied for the reasons stated above; and it is further

Ordered that defendant's Motion for Summary Judgment of dismissal be and the same is Granted in part and Denied in part, for the reasons stated above, as set forth below:

(1) That Summary Judgment of dismissal is Granted as to those portions of this action wherein plaintiffs request TCMP "source" material and TCMP statistical compilations relating to Phases II, III, and IV of the Taxpayer Compliance Measurement Program, which plaintiffs sought disclosed by way of Paragraph 4(d) and 4(b) of their Complaint; and such requests are hereby Dismissed from this action with prejudice for the reasons stated above; and

(2) That Summary Judgment of dismissal is Denied as to those portions of this action wherein plaintiffs request "reports and analyses" and "records outlining the statistical design" of Phases II, III, and IV of the Taxpayer Compliance Measurement Program, which plaintiffs sought disclosed by way of Paragraph 4(a) and 4(c) of their Complaint.

Order For Limited Discovery

This Matter is further to the Court's Order entered in this case this date granting in part and denying in part defendant's Motion for Summary Judgment of dis[illegible]issal. It appearing to the Court for the reasons stated in said Order which is attached hereto and incorporated herein by reference, that limited discovery by plaintiffs is necessary to allow plaintiffs an opportunity to reasonably identify those "reports and analyses . . . [and] records outlining the statistical design" of the Taxpayer Compliance Management Program ("TCMP") Phases II, III, and IV, it is therefore

Ordered



(1) That discovery shall be permitted for the limited purpose of providing plaintiffs an opportunity to correct their present failure to reasonably identify those documents now broadly described by plaintiffs in Paragraph 4(a) and 4(c) of their complaint.

(2) That for the purposes of defining the remaining scope of this action subsequent to the Court's Order dated this date granting defendant partial summary judgment, plaintiffs' request in Paragraph 4(a) and 4(c) of their Complaint for disclosure of TCMP reports and analyses, and records outlining the statistical design (both planned and achieved), shall hereafter be defined as and limited to those yet undisclosed.

> "reports [defendant] has prepared which contain the analysis of [the statistical tabulations of TCMP. Phases II, III, and IV already produced by defendant]" which reports present the "actual findings" and "factual impressions" of the defendant arising from said statistical tabulations and relating to the Taxpayer Compliance Measuremenat Progrm, Phases II, III, and IV.

See Page 11, Court's Order Granting Partial Summary Judgment, dated this date and incorporated herein by reference;

(3) That all discovery being permitted pursuant to this Order shall be concluded no later than July 30, 1976;

(4) That a conference shall be held as soon as is practicable between the parties for the purpose of discussing and agreeing upon a schedule for those

depositions plaintiffs desire to hold pursuant to this Order;

(5) That if the parties are unable to agree upon such a deposition schedule by June 9, 1976, plaintiffs shall submit to the Court their proposed schedule of depositions no later than June 10, 1976, and defendant shall submit its objections, if any, to the Court no later than June 11, 1976; the Court shall thereafter order depositions to be taken on the dates to be established by the Court;

(6) That defendant shall make available for deposition those knowledgeable employees of defendant who can be expected to provide assistance to plaintiffs in reasonably identifying those yet undisclosed TCMP reports, if any, as defined herein;

(7) That said discovery shall be limited strictly to discovering information that can reasonably be expected to assist plaintiffs in identifying any undisclosed TCMP reports, if any such reports exist, as defined by the plaintiffs and Court herein and as set forth in Paragraph 2 of this Order; no discovery on matters outside the remaining scope of this action shall be permitted;

(8) That in order to allow the depositions to be completed as quickly and smoothly as possible, defendant shall not instruct its employees being deposed to not disclose the identity of a document when asked even though defendant or its employees feel such document is outside the scope of the remainder of this case; rather, defendant shall note its objection to production of such a document at that deposition,



which objection may be renewed before the Court upon completion of all discovery;

(9) Plaintiffs shall submit to the Court upon completion of discovery, and no later than July 30, 1976, a complete and final list of those documents, reasonably identified, which plaintiffs claim exist and are within the scope of their original request, as defined and limited by the Court herein;

(10) Defendant shall make available to plaintiffs copies of all documents requested by plaintiffs in their July 30, 1976 list, or in the alternative shall submit those documents to the Court which defendant in good faith asserts fall outside the scope of this action, as defined herein, for an in camera inspection within a reasonable time after the request is made and no later than August 20, 1976;

(11) Plaintiffs may be assessed the direct costs incurred by defendant for document search and duplication of any document hereafter requested by plaintiff in this action in accordance with 5 U.S.C. § 552(a)(4)(A).

It is further

Ordered that defendant's Motion For Protective Order be and the same is Denied, discovery being permitted in accordance with this Order.

U.S. DISTRICT COURT
WESTERN DIST. OF WASHINGTON

No. C75-228S

Sept. 13, 1976

SUSAN B. LONG, ET VIR, PLAINTIFFS

*v.*

U.S. INTERNAL REVENUE SERVICE, DEFENDANT

Susan B. Long, pro se.

Charles Pinnell, Assist. U.S. Atty., for Defendant.

McGOVERN, Chief Judge:

Memorandum And Order On Documents Requested By Plaintiffs And Objected To By Defendant

This Matter comes on for consideration upon completion of the Court's in camera review of those documents requested by plaintiffs in their "List of Documents Filed Pursuant to June 1, 1976 Order for Limited Discovery" which the defendant claims are exempt from disclosure under the Freedom of Information Act (hereinafter "FOIA" or "the Act"). 5 U.S.C. § 552.

The Court having considered the records and files herein, including but not limited to plaintiffs' List of Documents and accompanying affidavit dated and filed July 29, 1976; defendant's Response Pursuant to the Court Order of June 1, 1976 and the affidavits of Saul Kruger and Billy G. Morrison submitted in support of defendant's Responses; and plaintiffs' Reply to



Defendant's Response together with the exhibits attached thereto; and having carefully and fully reviewed each contested document, concludes as follows as to each document in issue:

(1) Item 2: This item, identified as Phase III, Cycle I Error data, is contained within three volumes. It is, generally speaking, approximately 3000 pages of computer printout with each page containing approximately 53 lines of solid numbers. The defendant has submitted the affidavit of Mr. Kruger dated August 26, 1976 wherein Mr. Kruger states: "To my knowledge such data includes taxpayer identifying data." The Court in its Order Granting Partial Summary Judgment entered June 1, 1976 [38 AFTR 2d 76-5143] ruled that raw data which contained taxpayer identification information which was not reasonably segregable was exempt from disclosure under FOIA. (See pages 2-9 of said Order). The Court finding that Item 2 contains taxpayer identification information (albeit in code) not reasonably segregable, the Court concludes for the reasons set forth in its Order Granting Partial Summary Judgment that Item 2 is exempt under the Act from disclosure.

(2) Items 19-26: Defendant has submitted the affidavit of Mr. Morrison dated August 30, 1976, which states:

> Of the aforementioned sought items, the only consolidated Internal Audit report which has been prepared is set forth in item (25), Taxpayer Compliance Measurement Program, Phase III, Cycle 4. Consolidated Internal Audit reports

for items (19) through (24) and (26) were never prepared.

Item 25 is entitled "Consolidated Internal Audit Report—Review of Closed TCMP Examinations—Phase III, Cycle 4 (Individual Returns)" and consists of six (6) typewritten pages. The defendant claims said document is exempt under subsections (b)(2) and (b)(5) of Section 552 of Title 5, United States Code.

The Court accepts the uncontroverted affidavit of Mr. Morrison as being true, and limits its review to Item 25.

This Report is a summary of an internal audit which was conducted by the Internal Audit Division of the IRS, using a random sample of 449 returns selected from a total of 15,024 returns which had been examined under the Taxpayer Compliance Measurement Program (TCMP) as of October 10, 1973. Essentially it is a self-critique conducted by the Audit Division on the accuracy and standards being achieved by revenue agents involved in making the initial TCMP examination of selected tax returns. The Report concludes with recommendations by the Operations Branch for improvements in the TCMP data-gathering process based upon factual data contained within the Report. The subject matter of the Report is such that it falls within the scope of this action as classified by the Court's Order For Limited Discovery entered June 1, 1976.

It is the Court's opinion that the Report is not exempt from disclosure under (b)(2) but is partially exempt under (b)(5). Exemption (b)(2) exempts



documents related solely to the internal personnel rules and policy. It is clear from inspection of the Report that it does not relate solely to such "housekeeping" matters, though it does focus in large part on the internal personnel practices of the IRS, specifically, the practices of revenue agents in gathering TCMP data from tax returns. In adopting the Senate Report's interpretation of the ambiguous language of (b)(2), the Court in Vaughn v. Rosen, 523 F.2d 1136, 1140-42 (D.C. Cir. 1975), limited this exemption to housekeeping matters of a trivial or minor nature. Accord, Benson v. GSA, 289 F.Supp. 590, 595 (W.D. Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969). On this basis the Court here cannot find Item 25 exempt under (b)(2).

Exemption (b)(5) excludes from disclosure only those inter-agency or intra-agency memoranda or letters which would not be discoverable in litigation with an agency. The only matter which could be privileged from discovery in the normal civil action would be the "confidential intra-agency advisory opinions . . ." where disclosure would be injurious to the effectiveness of the Audit Division. National Labor Relations Board v. Sears, 421 U.S. 132, 149 (1975). Discovery of purely factual material severable from the opinion portion of a document would be allowed in the normal civil context, and thus such material is not exempt from disclosure under FOIA. EPA v. Mink, 410 U.S. 73, 91-93. The Court finds here that the factual presentation contained in the Report (Item 25) can easily be disclosed to plaintiffs without disclosing the private

pre-decisional recommendations. The conclusions and recommendations made at the end of the Report clearly are not final decisions but are pre-decisional and a direct part of the on-going, deliberative process of the agency. Thus, that portion of Item 25 is exempt under Exemption (b)(5).

(3) Item 28: Identified as "Score Dollar Distribution of DIF Formulas Selected for 1974 Implemention," Item 28 is 704 pages of numerical data without any other identifying features. Plaintiffs argue that "despite the Court's February 10, 1976 Order requiring the producting of these tabulations, they [the above-described documents] continued to [be] withheld from plaintiffs." (Affidavit of Susan B. Long at page 8, dated July 29, 1976 and attached to "List of Documents" filed on the same date.)[1] Defendant does not claim an exemption for Item 28 but instead argues that the data requested falls outside the scope of this action. The Court agrees.

Because of recurrent difficulties arising throughout this action in defining the scope of plaintiffs' requests for documents due to the nature and breadth of TCMP, and because it had become clear to the Court that plaintiffs were attempting by this action to obtain documents from the defendant while avoiding FOIA's requirements for exhaustion of administrative remedies, the Court felt compelled to and did restrict the

[1] The Court considers this interpretation by Mrs. Long of the Court's Order entered (by minute entry) on February 10, 1976 to be a flagrant and inexcusable disregard of the actual language of said Order.



scope of this action by strictly construing and defining plaintiffs' requests for certain TCMP documents. (See Court's Orders For Partial Summary Judgment and For Limited Discovery entered June 1, 1976.)

Score Dollar Distribution of DIF Formulas relate to the Discriminant Function (DIF) System which has been recently implemented by the IRS and which is to provide a comprehensive measurement of voluntary taxpayer compliance levels that is less time-consuming and less expensive than the older TCMP system.

While recognizing that the DIF mathematical scores have been derived from TCMP data, it is the Court's opinion that Item 28 relates primarily if not solely with the Discriminant Function System and not with TCMP. Therefore plaintiffs' request for disclosure of said document in this action is improper and will be denied.

(4) Item 29: This document is entitled "Estimating Tax Change and Voluntary Compliance Levels From DIF Scores" and has been prepared as a "staff paper" by the Planning and Analysis Division—IRS, and is dated March 1971.

The first nine (9) pages of the document discuss the development of the Discriminant Function System and its relation to the older Taxpayer Compliance Measurement Program. The last six (6) pages deal exclusively with the DIF program, its methodology and the assumptions made in considering such a program.

The defendant does not claim an exemption of said document but does assert that it falls outside the scope of this action. Plaintiffs argue, concededly without first having had an opportunity to view the document in question, that Item 29 is a report or analysis of TCMP statistical compilations. This it clearly is not. It does appear to include, however, a critique of the TCMP and its over-all performance.

In the Court's opinion, the nine- (9) page portion of Item 29 dealing in part with TCMP is severable from that portion dealing exclusively with DIF which constitutes matters clearly outside the scope of this action. On this basis the Court orders disclosed that portion of Item 29 entitled "Estimated Tax Change and Voluntary Compliance Levels, 1965 and 1969 Individual Returns Filed," pages 1 through 4, plus the two pages of tables attached thereto. The remainder of the document is not properly disclosable under this action and the Court therefore does not order it disclosed.

Accordingly, the Court orders disclosed those portions of Items 25 and 29 described above. The defendant has requested that the records ordered disclosed in this action be kept under seal until a final determination is made whether to appeal this order. The Court hereby grants the defendant's request and orders that those documents ordered disclosed herein be kept under seal until 30 days from the date of entry of Judgment in this action, and if notice of appeal is filed herein by defendant, until a final determination is had in this matter.



In addition, the Court having completed its in camera review of the documents requested by plaintiff which the defendant refused to disclose, the Court concludes that all issues raised in the instant cause are now finally resolved, and the Clerk of the Court is instructed to enter in Judgment of Dismissal with prejudice as to this action.

So Ordered.

U.S. DISTRICT COURT
WESTERN DIST. OF WASHINGTON, SEATTLE

No. C76-901S

July 29, 1977

SUSAN B. LONG and PHILIP H. LONG, PLAINTIFFS

*v.*

U.S. INTERNAL REVENUE SERVICE, DEFENDANT

Stephen K. Strong, Bendich, Stobaugh & Strong, Attys. for Plaintiffs.

Charles Pinnell, Asst. U.S. Atty., Robert L. Gordon, Atty., Tax Div., Dept. of Justice, Wash., D.C., for Defendant.

SHARP, District Judge:

Order On Motions

Plaintiffs brought this action under the Freedom of Information Act, 5 U.S.C. § 552, to enjoin the Internal Revenue Service from refusing to release to them certain documents and records concerning the Service's "Taxpayer Compliance Measurement Program". Before filing this action plaintiffs had requested these items from the IRS but their request had been denied. However, after the initiation of this lawsuit the IRS agreed to comply with plaintiffs' requests. Claiming full compliance with those requests, the IRS moves this Court to dismiss plaintiffs' com-



plaint as moot. Plaintiffs resist dismissal, maintaining that IRS compliance with their requests may be incomplete and therefore their complaint is still a viable one. Plaintiffs seek to undertake certain discovery to prove their claim of IRS noncompliance with the Freedom of Information Act. The Court, after duly considering the various motions presented herein, rules as follows:

Motion To Dismiss

The issue posited by this motion is whether or not this Court retains jurisdiction over this matter subsequent to an IRS agreement to comply with plaintiffs' requests. This Court resolves the issue affirmatively. The pleadings in this matter evidence to this Court that the controversy herein may not be moot. Accordingly, defendant's Motion to Dismiss is Denied.

Related Discovery Motions

Inasmuch as this Court has concluded that this case is not moot, defendant's Motion for a Protective Order based on that ground is Denied. The discovery sought by plaintiffs examines the parameters of IRS compliance with the Freedom of Information Act and this Court must reject defendant's assertion that its scope or subject matter is improper. Schaffer v. Kissinger, 505 F.2d 389 (D.C.Cir. 1974). Accordingly, plaintiffs' Motion to Compel Discovery is Granted.

## Motion For Expenses

Plaintiff's Motion for Expenses is Denied. If at the conclusion of this litigation the Court finds an award of expenses to be warranted, the Court will order the same.

It Is So Ordered.



## APPENDIX B

## UNITED STATES COURT OF APPEALS
## NINTH CIRCUIT

No. 76-3734

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

May 2, 1979

Appeal was taken from judgment of the United States District Court for the Western District of Washington, Walter T.

American Civil Liberties Union, Stephen K. Strong, Seattle, Wash., for plaintiffs-appellants.

Richard W. Perkins, Murray S. Horwitz (argued), Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before KOELSCH and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

KENNEDY, Circuit Judge:

This case comes as an appeal from the district court's granting of appellee's motion for partial summary judgment by which appellants were denied access to certain information they seek under the Free-

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* Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

dom of Information Act (FOIA), 5 U.S.C. § 552. Appellants request all the information the IRS has compiled in the Taxpayer Compliance Measurement Program (TCMP). TCMP is a continuing series of statistical studies by the IRS on a national scale to measure the level of compliance with federal tax laws.

The IRS has disclosed all statistical tabulations based on the TCMP.[1] The primary issue on appeal is whether TCMP source material must also be disclosed. This source material is in the form of check sheets and data tapes. Check sheets are the underlying documents from which TCMP statistics and conclusions are derived. Each check sheet contains information from an individual taxpayer's tax return and includes the taxpayer's name, address, social security number, and all the financial data reported on the return. A check sheet also contains additional information obtained by audit of the return. The computer data tapes contain the same information as the check sheets, with the exception of the taxpayer's name and address. Appellants state they are interested primarily in the data tapes; they seek individual check sheets only where necessary to interpret the tapes. Appellants do not seek the identities of individual taxpayers, and they request that identifying

[1] Although the tabulation material sought by the Longs has been released, they argue that the district court should have granted a permanent injunction against further withholding of this information. This issue is discussed later in this opinion.



information be deleted both from the tapes and the check sheets.

We dispose at the outset of any contention that computer tapes are not generally within the FOIA. The district court apparently determined that the term "records," as used in the Act, does not include computer tapes. This conclusion, however, is quite at odds with the purpose and history of the statute. The Senate Report which accompanied the 1974 amendments to the FOIA expressly considered special problems of computer records in the context of search and copying fees. S.Rep. No. 854, 93rd Cong., 2d Sess. 12 (1974). Moreover, the Treasury Department's FOIA regulations make explicit provision for disclosure of "records maintained in computerized form." 31 C.F.R. § 1.5(f) & 1.6(g)(3)(ii) (1977). In view of the common, widespread use of computers by government agencies for information storage and processing, any interpretation of the FOIA which limits its application to conventional written documents contradicts the "general philosophy of full agency disclosure" which Congress intended to establish. S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). We conclude that the FOIA applies to computer tapes to the same extent it applies to any other documents. *Cf. Save the Dolphins* v. *United States Department of Commerce*, 404 F.Supp. 407, 410-11 (N.D.Cal. 1975) (ordering disclosure of nonexempt portions of a motion picture); *see also SDC Development Corp.* v. *Mathews*, 542 F.2d 1116 (9th Cir. 1976) (holding that computer materials for library refer-

ence are exempt but basing the ruling solely on the nature of the information contained in the tapes.)

More difficult is the IRS argument that TCMP source information is protected from disclosure under exemption 3 of the Act, which provides the FOIA does not apply to matters that are:

> (3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .[2]

Exemption 3 necessarily requires reference to some other statute, and the IRS relies primarily on 26 U.S.C. § 6103, which provides detailed rules for the disclosure of tax "returns" and "return information." The IRS argues that the tapes and check sheets are return information, prohibited from disclosure by section 6103 except where that section so allows. Appellants reply that the source data does not constitute "return information" as defined by section 6103 and point to what the parties call the "Haskell amendment," which provides that "return information" does not include data in a form which "cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b)(2). Appellants argue that they seek information with the taxpayers' identities deleted and that so edited the data are not "return information" as defined by the statute.

[2] This is the version of exemption 3 now in effect. This section and 26 U.S.C. § 6103, discussed *infra*, were amended after the district court's decision. All parties agree, however, that the current versions apply. *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).



The district court, applying the predecessor to the current section 6103, held the source information exempt from disclosure even if names, addresses, and social security numbers are deleted. The court held further that whether or not removal of the identifying information would take the material outside the scope of section 6103, the IRS had no duty to remove the identifying material to bring it within the FOIA.

Turning first to the obligation of the agency to edit the materials, we cannot agree with the district court. The FOIA requires that "[a]ny reasonably segregable portion" of a requested record must be revealed "after deletion of the portions which are exempt." 5 U.S.C. § 552(b). *See* 31 C.F.R. § 1.2(c)(3) (1977). The district court, relying primarily on Chief Justice Burger's dissent in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 385, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976) and on *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), concluded that the process of deleting identifying information would result in the creation of a whole new record and that therefore segregation of the material was not required. We do not believe, however, that the mere deletion of names, addresses, and social security numbers results in the agency's creating a whole new record. The facts

here are very different from the *Sears* case. There, the issue was whether agencies were required to explain the meaning of the phrase "in the circumstances of this case" and to provide all the documents on which they relied as showing the circumstances of the case. The Supreme Court held that the FOIA does not require agencies to create records that did not previously exist. Requiring an agency to write an opinion upon request is far different, however, from requiring it to excise a name or social security number from an existing record. *Rose* does not support the IRS position either. The reasoning of the majority opinion in that case leads us to conclude that the editing required here is not considered an unreasonable burden to place on an agency. *Rose* concerned records of disciplinary proceedings at the Military Academy and sensitive questions of privacy were involved. Although the district court in that case was required to determine on remand whether the deletion of personal references would be sufficient to safeguard privacy, the majority apparently rejected the argument that such editing could not be required because it was too burdensome.

The district court in the present case concluded that the deletion of identifying information would be so expensive that the IRS was relieved of its duty imposed by the FOIA to segregate revealable information. Noting that the IRS had estimated the total cost of editing and reproducing all the check sheets and tapes to be about $160,000, the court held that "the magnitude of time and expense required to



'sanitize' the TCMP source material prior to disclosure is a matter of law unreasonable." Record, vol. III, at 862.

As an initial matter, we note the $160,000 is the estimated cost for editing and reproduction. Both the FOIA and Treasury regulations permit a fee to be charged for the cost of record search and reproduction, so the IRS will not bear the costs attributable to these functions. 31 C.F.R. § 1.6(g)(1)(i) & (ii), (g)(3)(ii) (1977). Moreover, the most significant portion of the $160,000 expense figure, about $150,000, is the estimate for editing and reproducing all of the 200,000 check sheets. Appellants have indicated, however, that they do not seek all or even most of the check sheets. They are primarily interested in the computer tapes and only seek the check sheets where there is a problem with interpretation of the tapes.

Even after these appropriate adjustments have been made, a very difficult question remains of whether the cost and inconvenience to the agency attributable to the editing process can be the sole basis for determining that material is not reasonably segregable. Treasury regulations define "reasonably segregable portions" to be "any portion of the record which is not exempt . . . and which after deletion of the exempt material still conveys meaningful and nonmisleading information." 31 C.F.R. § 1.2(c)(3) (1977). These regulations make no reference to cost or convenience as a relevant factor in the determination.

Additional insights on this question can be derived from the 1974 amendments to the FOIA dealing with fees, which provides that agencies can only charge for the direct costs of search and duplication. Pub.L.No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552(a)(4)(A)). As a result of this amendment, the Treasury Department adopted a new FOIA fee regulation which states that "under no circumstances will a fee be charged for . . . deleting exempt matter . . . ." 31 C.F.R. § 1.6(a)(1) (1977).[3] The legislative history indicates that the intent of the amendment was so that "fees should not be used for the purpose of discouraging requests for information as or obstacles to disclosure of requested information." S.Rep. No. 1200, 93rd Cong., 2d Sess. (1974); [1974] U.S. Code Cong. & Ad.News 6267, 6287. The clear implication of this is that the agencies are expected to bear the cost of editing. It can be argued with some persuasiveness that, while Congress intended that agencies would bear substantial costs in processing FOIA requests, it did not intend to foreclose the possibility that at some point the costs of segregation might be so extreme that the request would have to be dismissed as unreasonable. We do not reach the issue, for in this case the costs of editing are not so high that segregation is unreasonable.

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[3] The Longs, in arguing that the $160,000 cost estimate relied on by the district was too high, contend that the regulations do permit requesters to be charged the cost of deleting information from computer records. *See* 31 C.F.R. § 1.6(g)(3)(ii) (1977). We do not reach this issue.



In order to put this matter in perspective, it is useful to note how costly the FOIA can be generally for agencies. In 1976, the FBI assigned 191 full-time employees to the sole task of processing its FOIA requests, see *Open America* v. *Watergate Special Prosecution Force*, 178 U.S.App.D.C. 308, 316, 547 F.2d 605, 613 (1976), and that agency estimated that in 1977 the cost to it alone of complying with the FOIA would be $2,675,000. *See id.* 178 U.S.App. D.C. at 315, 547 F.2d at 612. In one case Judge Green of the United States District Court for the District of Columbia ordered the Justice Department to comply within three months to a FOIA request from the son of Julius and Ethel Rosenberg for information concerning the trial and execution of his parents. *Meeropol* v. *Levi*, No. 75-1121 (D.D.C. order issued Aug. 27, 1975). Compliance with that order required the agency to assign 65 full-time and 21 part-time employees solely to processing that one request. *See Open America*, 178 U.S.App.D.C. at 316 n.15, 547 F.2d at 613 n.15. Despite the massive expenses that can be involved in even a single request, Congress has not limited access under the Act. Whether such expenditures are good policy is not a question for us to decide. Congress has determined that access to government records is an important objective. We therefore cannot conclude that the costs of editing involved in this case are so extreme that segregation of revealable material is unreasonable as a matter of law.

Some further problems remain. First the IRS states that even without names and social security numbers, there is a risk of indirect identification. We agree with the IRS that more facts are necessary to decide this point, and we remand for the district court to determine whether disclosure of TCMP source data entails a significant risk of indirect identification. We note that with respect to the tax model, there is a similar risk that disclosure of the information will permit indirect identification, yet the administrative practice of the Revenue Service has been to release such information. In evaluating the degree of the risk of disclosure from TCMP source material, it will be helpful to compare the risk that the IRS has found acceptable with respect to the tax model.

The second argument of the IRS is that a requirement to disclose the edited data would be a significant extension of the duty to disclose under the law prior to the Haskell amendment and that it was not the intent of the amendment to effect such changes. While we are prepared to agree that the history of the amendment reveals an intent not to increase the reach of the FOIA, that observation is helpful only if it is reasonably clear what Congress perceived the law under the FOIA to be when it adopted the amendment.

The IRS asserts that the purpose of the Haskell amendment was to permit disclosure only for those records which, under IRS practice at that time, were being disclosed. The sole support for this interpretation is a comment by Senator Haskell that, "the addi-



tion by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which under its current practice, has been subject to disclosure, will not prevent disclosure . . . ." 122 Cong.Rec. S12606 (daily ed., July 27, 1976). This comment was directed solely to whether the IRS could evade its obligations by adding information. We do not interpret it to indicate that the amendment was intended simply as a codification of the existing IRS practice.[4]

The IRS poses a difficult question directed to a possible contradiction within section 6103 regarding the definition of "return information." The statutory device used by the Haskell amendment is to de-

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[4] Even if we were to accept the IRS argument that the Haskell amendment was simply intended to freeze the status quo, neither our research or that of the parties reveals any case deciding whether, under the law existing prior to the Haskell amendment, audit results which were not identified to particular taxpayers were open to FOIA disclosure. We do note that even with respect to the question of the availability of audit information identified to a particular taxpayer there was a split in the cases, with two district courts holding that it was unavailable, *Kirk, Jr.* v. *First Nat'l Bank*, 38 A.F.T.R.2d 76-5718 (N.D.Ga. Aug. 27, 1976); *Glickman, Lurie, Eiger & Co.* v. *IRS*, 36 A.F.T. R.2d 6111 (D.Minn. Oct. 14, 1975), and a third holding in dicta that it could be revealed, *B & C Tire Co.* v. *IRS*, 376 F.Supp. 708, 711-12 (N.D. Ala.1974). It was not clear then and it is not clear now whether the data in question would have been available under the previous language of section 6103 and the FOIA. We cannot presume to say with assurance what Congress understood about the scope of the FOIA with reference to this information at the time they debated the amendment.

fine return information so that it does not include data that identifies a taxpayer. 26 U.S.C. § 6103 (b) (2). But, by implication, the provisions of the statute pertaining to congressional disclosure make a distinction between return information of two kinds, return information that identifies and return information that does not.[5] 26 U.S.C. § 6103(f)(1) & (2); *see also id.* § 6103(f)(4)(A) & (f)(4)(B). The IRS thus contends that the mandate of section 6103 not to disclose "return information" may extend to returns which do not identify individual taxpayers, notwithstanding the Haskell amendment. We agree that the implication the IRS advances is quite reasonable, but it nevertheless does not resolve this case, because we are left with two sections that are flatly inconsistent. Therefore, we must decide whether the definition of "return information" is controlled by the explicit language of the Haskell amendment, contained in the definitional subsection itself, or by an implication drawn from another subsection. Given the choice between adopting the explicit language of one section and an inconsistent implication of another,

[5] Subsection (f) (1) of section 6103 provides that on written request, from the chairman of any of several congressional committees, the Secretary shall furnish the committee with

> any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such sommittee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.



we chose the explicit language, particularly where, as here, it is consistent with the overall purpose of the Act. The explicit provision is section 6103(b), and by its terms data that do not identify is disclosable. As noted, it is the clear purpose of section 6103 to protect the privacy of taxpayers. At the same time the amendment demonstrates a purpose to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach. Our reading of the statute implements these dual purposes. Appellee's reading, on the other hand, would prevent the disclosure of useful information even when there is no threat to taxpayer privacy.[6]

The IRS also points to section 6108 which requires the Secretary to prepare and disclose statistical studies and compilations. It notes that section 6108(c) contains language identical to the amendment, providing that no study shall be disclosed if it identifies a particular taxpayer. It argues that section 6108 demonstrates that the amendment to section 6103 was directed at statistical studies and not the source data sought in this case. We do not find it necessary to interpret the reach of section 6108. It suffices to note

[6] Some useful information which does not identify particular taxpayers may nonetheless be exempt from disclosure under the FOIA by virtue of some other exemption. For example, exemption 7(E) permits withholding of investigating records compiled for law enforcement purposes which disclose investigative techniques and procedures. However, in this case the IRS has not raised any other exemptions which might prevent disclosure of this information.

that the Haskell amendment permits disclosure of the tax model, which is a collection of source data similar to the source material for TCMP.

The district court after considering the interests of the plaintiffs and the public in disclosure, concluded that equity did not favor disclosure.[7] *See Theriault* v. *United States*, 503 F.2d 390, 392 (9th Cir. 1974). The court reasoned that what was really important were the statistical tabulations previously disclosed, not the raw data, because it was only from the statistical summary that the effectiveness of the IRS could be evaluated. This conclusion is valid only if we assume that the IRS statistics encompass every useful analytic conclusion that could be drawn from the information. We find no evidence in the record to support that proposition. With respect to the tax model the IRS will either supply statistical tabulations from the data base or it will supply the source data itself, apparently recognizing the value of a researcher's doing his own analyses. The TCMP is similar. Neither party disputes that the information to be derived from the TCMP is extremely useful in formulating tax policy and in evaluating current practices. We cannot say the source data will be irrelevant to such evaluations.

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[7] We note that in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), the Supreme Court made clear that an individual's rights under the FOIA are neither increased nor decreased by reason of the nature of his particular interest in the sought documents. The Act is designed to inform the public and it is the public interest which determines whether documents are exempt.



The district court did not point to any public harm which will result from disclosure, other than the expense and inconvenience involved. We believe that in view of the usefulness of the information, the strong congressional policy favoring disclosure, and the apparent congressional willingness to impose substantial costs on agencies in the interest of public access to information, the costs and inconvenience in this case are not alone sufficient to require nondisclosure.

Appellants raise two final matters. First, they contend that the trial court erred in failing to state that certain records originally sought by appellants and later released by the IRS are not exempt and in failing to enjoin the IRS from further violations. Appellants note that at oral argument on the motion for summary judgment, counsel for the IRS agreed to a stipulation that the materials made available were not exempt and to an injunction against further withholding of those or similar materials. The Longs prepared an order in accordance with the stipulation and noted it for hearings without objection. The order, however, was never entered and the district court in its final disposition granted a dismissal, believing that there remained no genuine issue of material fact. The Longs contend that the IRS has had a past history of violating the FOIA, and point in particular to the difficulty they have had in securing these and other materials. There is no indication in the opinion of the district court that it considered this problem. Therefore, on remand, we request the district court to consider whether in light of all the circumstances in-

cluding the apparent concession by counsel for the IRS that the records are not exempt, Record, vol. IV, at 1065, *see Consumers Union of United States, Inc.* v. *Veterans Admin.*, 436 F.2d 1363, 1365-66 (2d Cir. 1971), an injunction is appropriate.

Finally, appellants request an award for costs and attorney fees. As to costs incurred at the district court level, that is a matter which must first be ruled on by the district court and about which we express no opinion. Rule 39(a) of the Federal Rules of Appellate Procedure provides that where the judgment is vacated, costs of appeal shall be awarded only if ordered by the court. In addition, rule 39(b) provides that costs can be awarded against the United States if "authorized by law." The authorization for the assessing of costs and attorney fees derives from 5 U.S.C. § 552(a)(4)(E) which permits an award where the complainant "has substantially prevailed." The legislative history indicates that the award of attorney fees was not intended to be automatic. Courts are expected to consider the benefit to the public derived from the case, the commercial benefit to the complainant, the nature of the complainant's interest in the records, and whether the government withholding of the records has a reasonable basis in law. S.Rep.No.1200, 93d Cong., 2d Sess. (1974); [1974] U.S.Code Cong. & Ad.News 6267, 6288. These matters are also appropriate for resolution by the district court after further proceedings.

Judgment vacated and case remanded.



## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3734

[Filed Sep. 27, 1979]

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Washington

Before: KOELSCH and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

ORDER DENYING PETITION FOR REHEARING

PER CURIAM:

In its petition for rehearing, the Government now contends that publication of the TCMP will permit taxpayers to know the formulae used by the IRS to select tax returns for audit, thereby detracting from the effectiveness of the audit process. This contention was not previously raised in arguments before this court, and it was not adequately presented before the district court either.

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* Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

In its motion for summary judgment before the district court, the IRS asserted, without explanation or citation to the record, that disclosure of the TCMP would severely hamper the administration of the tax laws. The only support in the record to which the IRS now points are two affidavits which state that the IRS, using the TCMP, classifies taxpayers based on asset or income size and, applying the discriminant function technique, calculates a voluntary compliance level for each group. But the fact that the IRS uses the TCMP in this particular manner does not demonstrate that enforcement will be made more difficult by disclosure of the TCMP data. *Cf. Hawkes* v. *IRS*, 507 F.2d 481 (6th Cir. 1974) (disclosure of IRS Manual and the Return Classifier's Handbook would not significantly impede enforcement of the revenue laws). In its opinion, the district court quite properly made no reference to this unsupported argument by the IRS.

We conclude that the factual assertion raised by the IRS in its petition is not timely and the petition for rehearing is denied.



**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3734

[Filed Nov. 9, 1979]

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

Before: KOELSCH and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

ORDER

Judge Kennedy has voted to reject the suggestion for a rehearing en banc, and Judges Koelsch and Jameson have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is rejected.

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* Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3734

DC# 75-228 WTM

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

JUDGMENT

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the



judgment of the said District Court in this Cause be, and hereby is vacated and case remanded.

Filed and entered May 2, 1979.

[A True Copy—Attest 1 Nov. 1979—
Richard H. Deane, Clerk of Court]

by: /s/ Oscar Tagle
OSCAR TAGLE
Deputy

## APPENDIX F

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not



in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July

4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to



all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.



(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If one appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the

person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonable necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determina-



tion by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would con-

stitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of



records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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No. 79-1269

IN THE

# Supreme Court of the United States

October Term, 1979

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INTERNAL REVENUE SERVICE, *Petitioner*

v.

SUSAN B. LONG and PHILIP H. LONG, *Respondents*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

STEPHEN K. STRONG
*Counsel for Respondents*

Office and P.O. Address:
BENDICH, STOBAUGH & STRONG
2111 Smith Tower
Seattle, WA 98104
(206) 622-3536

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

### RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose both the grant of a writ of certiorari and the summary action requested by Petitioner. Certiorari should be denied because the question stated in the Petition is neither presented by the decisions below nor the record and, since there is no final judgment by the district court, the petition is premature.

### OPINIONS BELOW

The district court's unreported order is Appendix A to the Petition. The opinion of the Ninth Circuit vacating the district court's order (App. B to Petition) is reported at 596 F.2d 362.

## QUESTIONS PRESENTED

Because the relief requested of this Court by Petitioner (Pet., p. 18) is inconsistent with its statement of the question (p. 2), the question presented must be restated as follows:

Should this Court, before final judgment in a case currently pending in the district court, intervene to require the lower court to consider two alleged defenses to disclosure of certain Internal Revenue Service records under the Freedom of Information Act (exemptions 2 and 7(E)), when the IRS has never asked the lower courts to consider them, the defenses have no record support and the lower courts have never addressed the defenses?

## STATEMENT OF FACTS

Because the petition ignores many important facts, distorts record evidence on essential points and contains over two pages of extrarecord factual fabrications (Pet., pp. 9-12), Respondents are compelled to submit this counterstatement of the facts.

Susan Long is a doctoral candidate in sociology writing a dissertation on the factors which determine the level of voluntary compliance with the tax laws. V R. 1485-87.[1] Both Susan and Philip Long have studied IRS administrative practices for several years, and their research has won them praise from many sources. III R. 582, 607-18. For example, the Feb. 5, 1975, *Wall Street Journal* stated (III R. 582):

> No one has done more to force public disclosure of the IRS audit policies and practices than Phil and Sue Long.

1. This record reference is to volume V of the record, page 1485. A copy of six-volume record was submitted to the Court by Petitioner.



The Longs were responsible for the release of major portions of the Service's Internal Revenue Manual to the public. *Long v. Internal Revenue Service,* 349 F.Supp. 871 (W.D. Wa. 1972). The Manual has proved to be of great value to tax practitioners. *See generally* A. Parnell, "The Internal Revenue Manual: Its Utility and Legal Effect," 32 *Tax Lawyer* 687 (1979).

The records sought by the Longs in this case contain part of the scientific data base compiled in the Service's Taxpayer Compliance Measurement Program (TCMP), the IRS research program which compiles data to answer fundamental tax policy questions concerning such matters as long range goals, appropriation requests and proposals for changes in the tax laws. Internal Revenue Manual (IRM) §125(18);[2] III R. 668-70. According to the IRS, the TCMP was established in 1962 as "a scientific research system" to provide a data base for long range planning of tax administration and policy. I R. 21-22; III R. 668-70; IRM §§125(18), 4861.1; IRM Supp. 14RDD-4 (July 2, 1962).[3] The purposes of the TCMP are summarized in IRM §125(18).1 (App. A. *infra,* la):

> (1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated.

2. The Internal Revenue Manual is the IRS policy and procedure manual. It contains guidelines and directives governing agency employees. The text of IRM §125(18) .1 and .2, which describe the TCMP, is in Appendix A to this brief.

3. IRM Supp. 14RDD-4, dated July 2, 1962, established the Taxpayer Compliance Measurement Program. The text of this IRS directive, containing a description of the program and its purposes, is set forth in Appendix B to this brief.

> (2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems.***

See also I R. 21-22; III R. 668-70.

A number of TCMP surveys have been conducted since the program was initiated in 1962, covering at least seven different types of taxes (individual, corporate, estate, etc.). Surveys of particular types of taxpayers are called "phases," and, if the survey is repeated, each specific survey year is termed a "cycle." I R. 20; III R. 668; IRM §4861.2. The Longs are not seeking data from all TCMP phases and cycles; they seek only the data compiled in Phase II (businesses that did not file returns) and early cycles of Phase III (individual returns) and Phase IV (small corporation returns). I R. 20.

A TCMP survey consists of the following steps:

1. A random sample of a specific type of returns is chosen by tax identification number (or, in the case of Phase II, a random sample of businesses that did not file returns and of geographic areas was selected) (I R. 21-22). The sample is subjected to intensive audits (I R. 669).

2. The taxpayers' reported figures and corrected figures from the audits are entered on computer data tapes (I R. 23; III R. 622).

3. Data on the computer tapes is statistically weighted to estimate for each class of taxpayers the total potential tax change if all returns were examined. The total tax



change is added to total tax reported to determine total tax liability for each class of taxpayers. The percentage of total tax liability that is reported is the "voluntary compliance level" for the class (III R. 669).

The IRS uses the data to evaluate and make changes in its operational and budgetary policies, such as by requesting appropriations for additional auditors. III R. 669; IRM §125(18). Because the TCMP samples can be used to represent the entire population, the TCMP data base is used for research and policy planning purposes by organizational units throughout IRS. III R. 669-70. Accordingly, the Ninth Circuit recognized that "information from the TCMP is extremely useful in formulating tax policy and in evaluating current practices." 596 F.2d at 369; Pet., App. B 42a.

Because the petition for certiorari deliberately confuses TCMP with an entirely separate audit selection program (Pet., pp. 3, 8-12), it is necessary that this statement of facts include a short discussion of something this case is *not* about—the discriminant function (DIF) scoring system.[4] Discriminant function analyisis is a mathematical technique used to determine how much weight should be given different variables in statistical data for classification purposes. III R. 765. The IRS applies the DIF technique to various taxpayer reporting characteristics to determine which variables on a tax return correspond to a higher likelihood of finding a significant tax change if the return is audited. III R. 765-66. Because the TCMP data base includes a scientifically selected random sam-

4. In contrast to its confusion of the TCMP with DIF in this Court, the IRS insisted in the district court that the development and updating "of DIF formulas is not a TCMP project or study." III R. 766.

ple of taxpayers, portions of the TCMP data can be used to represent charactistics of taxpayer classes as if all returns in the class were selected for audit. III R. 766. Some of this data, but not all,[5] is used to develop DIF formulae. *Id.* According to the IRS, the TCMP data base is not necessary for this purpose. The affidavit of James Swartzwelder, IRS planning officer, states, "the TCMP data base . . . is the best but not the only base available to the Internal Revenue Service for use in developing DIF formulas." *Id.*[6]

The formulae developed through discriminant function analyses are ultilized in a computerized scoring process which aids IRS personnel in classifying income tax returns. General Accounting Office, *How the Internal Revenue Service Selects Individual Income Tax Returns for Audit*, Report No. GGD-76-55 (Nov. 5, 1976) pp. 15-16, 19-20.[7] The DIF scoring system is not a substitute for the manual screening of returns by classifiers, but is simply an aid in screening returns efficiently and inexpensively. *Id.* at 16, 30-31. In the end, the effectiveness of the audit selection process depends on the judgment and experience of IRS return classifiers. *Id.* at 16, 19-20, 24. Since the return

5. For example, Phase II was a study of businesses that did not file tax returns. Accordingly, no formula based on Phase II data could conceivably be developed to select returns for audit. III R. 766. The Longs are seeking Phase II data in this action.

6. These facts concerning DIF are taken exclusively from an affidavit submitted to the district court by the IRS. Although the affidavit contains a detailed description of the DIF scoring system, there is no mention whatsoever of any harm to the DIF system if the TCMP data base were disclosed. In fact, the entire emphasis of the IRS affidavit was to show that DIF was not related to the TCMP.

7. Because the IRS has inaccurately described DIF in the petition and added new claims of harm without record support, it is necessary for Respondents to stray slightly from the record to explain what DIF really is. Respondents will provide citations to published sources of which the Court may take notice.



classifiers' role is the most important part of the audit selection process, it is noteworthy that the classifiers' instructions for selecting returns for audit have already been disclosed by the IRS in accordance with the decision of the Sixth Circuit in *Hawkes v. Internal Revenue Service*, 507 F.2d 481 (6th Cir. 1974). The *Hawkes* court rejected an argument similar to the one made by the IRS here. 507 F.2d at 484-85.

## ARGUMENT

### 1. The Question Stated In the Petition Is Not Presented By The Decisions Of The Courts Below Or The Record.

#### A. *The Issues Stated in the Petition Were Neither Raised by the IRS Previously, Nor Addressed by the Courts Below.*

This Court normally declines to consider arguments not previously raised by a party and not considered by the lower courts. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971). Thus, the Court refused to consider the possible application of exemption two of the Freedom of Information Act (FOIA) to certain agency records where the government had failed to raise the issue in the lower courts. *NLRB v. Sears*, 421 U.S. 132, 165 (1975). *See also Jordan v. United States Department of Justice*, 591 F.2d 753, 779 (D.C. Cir. 1978) (en banc) (The court refused to consider an agency's claim that exemption 7 of the FOIA protected certain records where the defense was first raised one month before oral argument.); *Ryan v. Department of Justice*, ..... F.2d ....., No. 79-1777 (D.C. Cir. 1980) slip opinion 19 n.38a (An

agency must raise an exemption "by identifying it at the district court level *and by demonstrating that the exemption applies to the documents in question.*" Emphasis in original.)

The only question stated in the Petition (p. 2) is whether IRS records containing a portion of the TCMP data base are exempt from disclosure under FOIA exemption 2 or 7. As the IRS concedes (Pet., pp. 15, 18), neither exemption has ever been claimed by the IRS before, in either the district court or the Ninth Circuit, and, consequently, neither court addressed these issues. In oral argument before the Ninth Circuit, counsel for the IRS was expressly asked whether release of TCMP data would harm law enforcement. Counsel replied that the issue had been specifically considered, but it was decided that the argument would not be raised. He also conceded that there was no record support for an argument that release of the TCMP data would harm law enforcement. Consequently, in its opinion the Ninth Circuit noted that the IRS had not claimed exemption 7 or any other exemptions except exemption 3 and 26 U.S.C. §6103.[8] 596 F.2d at 368 n.6; Pet., App. B, p. 41a.

The IRS claims (Pet., p. 14) that it "squarely presented" its new arguments in its petition for rehearing in the Ninth Circuit. However, that petition did not claim exemptions 2 or 7, but simply reiterated the legal argument that 26

8. In its petition, the IRS attempts to excuse its failure to raise its current claims in the lower courts because the availability of its argument under 26 U.S.C. §6103 appeared to make it unnecessary. Pet., pp. 13-14. However, the §6103 argument depended on a reading of the statute that was directly at odds with its language. See Petition at 13. Accordingly, it is very difficult to believe that the IRS was so certain of victory with its §6103 arguments that it could simply forget about other valid arguments.



U.S.C. §6103 barred disclosure. Some new factual points about DIF and harm caused by release were stated, but when Respondents moved to strike these false statements of fact without record support, the IRS insisted that its DIF argument was not new, "but instead is based on information contained within the existing record."[9] The Ninth Circuit then reviewed the record and found no support for the assertions about DIF. Pet., App. C, p. 46a. Accordingly, it held that the IRS had failed to properly raise the factual claim in the district court and denied the petition for rehearing. *Id.*

This Court normally will not consider arguments that were not squarely raised below. *United States v. Lovasco,* 431 U.S. 783, 789 n.7 (1977). In this case, the IRS never claimed exemptions 2 and 7 before the petition for certiorari. (Even the Solicitor General's application for extention of time to file the petition for certiorari stated that the question presented is the applicability of 26 U.S.C. §6103.) Accordingly, certiorari should be denied.

### B. *There Is Not Even A Scintilla of Evidence in the Record That Supports the Petition's Claim That Disclosure of TCMP Records Would Harm The Audit Selection Process.*

A fundamental principle of appellate review is that it must be conducted on the basis of the record, without consideration of extrarecord factual assertions in briefs or arguments. *Schley v. Pullman Car Co.,* 120 U.S. 575, 578 (1887); *Lawn v. United States,* 355 U.S. 339, 354 (1958). In spite of this rule, the petition for certiorari is replete

9. Appellee's memorandum in opposition to Appellants motion to strike, p. 2. A copy of this memorandum has been lodged with the Clerk.

with references to alleged facts that are not in the record (Pet., pp. 3-4 and 9-12).

The Ninth Circuit correctly noted in its order denying rehearing (Pet., App. C, p. 46a), that the IRS has no record support for its claim that disclosure of TCMP data would harm its law enforcement function by revealing DIF formulae used in the audit selection process. The only record reference to these matters is vague speculation in a supplemental memorandum by an attorney for IRS who suggests, without any explanation or record support (III R. 647):

> although the exact DIF system utilized by the Internal Revenue Service might not be duplicated, an individual with knowledge of how a DIF system is developed *could gain insight into the Internal Revenue Service's overall tax strategy.* As a result, the Internal Revenue Service's *efforts to administer the Internal Revenue laws could be severely hampered.* (Emphasis added.)

Similar speculation is found at two other places in this memorandum (III R. 638, 646). This unsupported speculation by counsel is the only point in the record cited in the petition for certiorari to support the factual assertions concerning harm allegedly caused by disclosure of the TCMP (Pet., p. 12).

Counsel's speculation in the supplemental memorandum is not evidence. It is not sworn and hence not admissible, and may not be considered by a court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 and 17 (1970); Civil Rule 56. Moreover, counsel's factual assertions without any evidentiary support violate the rules of professional conduct. ABA Code of Professional Responsibility, DR 7-106(c) (1), (3) and (4); *see* Civil Rule 11.



Even if counsel's statement were admissible evidence, it contained only the speculative conclusion that knowledge of DIF formulae "could" allow a person to "gain insight into the Internal Revenue Service's overall tax strategy." II R. 647. This is very different from the current claims of the IRS in its petition.

Since the arguments in the petition are wholly lacking in *any* support by evidence in the record, certiorari should be denied.

### C. *The District Court, Not this Court, Is the Forum In Which the IRS Can Try to Raise the New Claims Presented in the Petition for Certiorari.*

The IRS has chosen the wrong forum to initially seek the relief requested—leave to make an untimely claim of new defenses. As the Court noted in *NLRB v. Sears*, 421 U.S. 132, 165 n.30 (1975), the lower courts, not the Supreme Court, should decide in the first instance whether an agency can claim a new FOIA exemption after an appeal, when it failed to originally claim the exemption in the district court. This follows from the general rule that this Court does not review issues that are not presented by the record. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970).

By seeking leave to claim new defenses in this Court, rather than in the district court, the IRS is attempting to evade consideration of several important issues which should be resolved before granting such extraordinary equitable relief. The lower court should decide (1) whether the agency's conduct throughout the proceedings forecloses it from making its new claims; (2) whether the failure of the IRS to claim exemptions 2 and 7(E) pre-

viously, although the arguments were known to the IRS, is a waiver of the exemptions; (3) whether the Ninth Circuit remand forecloses any new defenses; (4) whether the Longs would be prejudiced by permitting the IRS to raise new defenses; and (5) whether the IRS has provided a sufficient offer of proof, with record evidence, to demonstrate that the newly claimed exemptions would apply. These issues require an extensive review of the record and consideration of new factual submissions, a role for which the district court, not this Court, is suited.

If, after considering these matters, the district court enters a final judgment requiring disclosure of the TCMP data, the IRS could appeal on the trial court record. If the Ninth Circuit then denies relief, the IRS could petition for certiorari and the Court would have a record upon which it could make an informed decision. Accordingly, the petition for certiorari is premature and should be denied.

**2. Certiorari Should Be Denied Under Supreme Court Rule 23(4) Because the Petition Contains Many Inaccurate and Extrarecord Factual Assertions.**

Supreme Court Rule 23(4) states that it is a sufficient reason for denying review if the petitioner fails "to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." Under this rule certiorari should be denied in the instant case because the IRS petition is based on inaccurate and extrarecord factual assertions.

Pages 3-4 and 8-12 of the petition contain numerous inaccurate factual assertions. As noted in Respondents' counterstatement of the facts, the Petition deliberately confuses the TCMP with an entirely separate program, the discriminant function component of the audit selection



process. For example, the IRS states that the TCMP is an "investigative technique" designed to select tax returns for audit. Pet., pp. 3, 9-12. This is false, since the TCMP records sought by the Longs simply contain a collection of facts (statistical data collected in TCMP surveys) that is used as a scientific data base for policy research purposes. III R. 668-70; IRM §125(18).1 (App. A), §4861.1; IRM Supp. 14RDD-4 (App. B). In addition, the petition contains many extrarecord factual assertions concerning harm to law enforcement that would allegedly be caused by disclosure of the TCMP data base (Pet., pp. 8-12).

Since the legal arguments in the petition for certiorari are dependent upon these inaccurate and extrarecord factual assertions, certiorari should be denied under Rule 23(4).

**3. Neither Exemption 7(E) Nor Exemption 2 of the FOIA Protects the TCMP Policy Research Data Base Sought by Respondents.**

***A. Exemption 7(E) Applies Only to Law Enforcement Records Compiled in the Course of A Specific Investigation, Not to Records of An Agency's Policy Research Program Such As the TCMP.***

Exemption 7 of the FOIA covers "investigatory records compiled for law enforcement purposes" if the agency can demonstrate that disclosure would cause one of several specified types of harm (5 U.S.C. §552(b)(7)). Hence, the initial inquiry under exemption 7 is whether the records at issue are "law enforcement" records. The Ninth Circuit stated an appropriate test for determining whether particular documents are "law enforcement" records in *Church of Scientology v. U.S. Dep't of the Army*, 611 F.2d 738 (9th Cir. 1979). The court said (at 748):

> In determining whether a "law enforcement purpose" is present, courts must look to the purpose behind the compilation of the document and determine whether the investigation has centered upon the suspected commission of specific illegal acts. * * * Generally, files such as "internal audits" compiled simply to determine whether an agency's internal operations comport with statute or regulations do not qualify.

The Justice Department has recognized this initial requirement. The *Att'y Gen. 1974 FOI Amdts. Mem.* (Feb. 1975) stated (at 6) that "[r]ecords generated for such purposes as determining the need for new regulations or preparing statistical reports are not 'for law enforcement purposes'."

Even if records are created as part of a law enforcement function, exemption 7 does not apply unless the documents are "investigatory records compiled in the course of a specific investigation." *Cox v. United States Dep't of Justice,* 576 F.2d 1302, 1310 (8th Cir. 1978); *Cox v. Levi,* 592 F.2d 460, 462 (8th Cir. 1979); *Sladek v. Bensinger,* 605 F.2d 899, 903 (2d Cir. 1979); *Church of Scientology v. United States Dep't of the Army,* 611 F.2d 738, 748 (9th Cir. 1979).[10]

The TCMP data at issue in this case does not meet even one of the elements of exemption 7(E). The TCMP is not a law enforcement activity, but a policy research program. III R. 668-70; IRM §125(18) (App. A). TCMP was initiated to provide a statistical data base which can be used

10. The only case cited in the petition (p. 15) for its contrary view that exemption 7(E) covers records that are not compiled in a specific law enforcement investigation is an unreported district court case, *Zamnik v. Dep't of State,* No. 79-1072 (D.D.C., Aug. 28, 1979). The *Zamnik* case is without precedential value because it was brought by a *pro se* plaintiff (apparently a drug addict) who failed to brief the exemption 7(E) issue. The district court's memorandum order contains no discussion of the coverage of exemption 7(E), only a conclusion.



to measure the efficiency of IRS operations, plan general tax administration strategy, propose changes in tax laws and support budget requests. *Id. See also* 1976 General Accounting Office report, *supra,* at 58-60. Lower courts that have inquired into the nature of the TCMP have found that it is not a law enforcement program. *United States v. Flagg,* ..... F. Supp. ....., 45 A.F.T.R.2d 80-618 (S.D. Iowa 1979); *United States v. First National Bank in Dallas,* 468 F. Supp. 415, 417 (N.D. Texas 1979). In each of these cases, the district court refused to enforce an IRS administrative summons under 26 U.S.C. §7602 for a TCMP audit because the summons was issued for a research, not an investigative purpose.

Because the TCMP is not a law enforcement program, but a data base for policy research studies, the Service's claim that the records fall within FOIA exemption 7(E) is without merit.

### B. *Exemption 2 Covers Only Matters "Related Solely to Internal Personnel Rules and Practices," Not A Policy Research Program Such As the TCMP.*

The Service's assertion that "there is a strong basis for the applicability of Exemption 2 to the TCMP" records at issue (Pet., p. 17), ignores both the language of exemption 2 and the rules stated in the decisions cited. Exemption 2 refers to "matters that are . . . related solely to the internal personnel rules and practices of an agency" (5 U.S.C. §552(b)(2). TCMP data is certainly not "related solely" to the agency's "internal personnel rules and practices," since it is nothing like the sort of trivial personnel matters (lunch hours, sick leave usage, etc.) that Congress intended that the exemption should cover. Senate Rep. No. 813, 89th Cong., 2d Sess. 8 (1965); *Dept. of the Air Force*

*v. Rose*, 425 U.S. 352, 366-67 (1976); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 763-71 (D.C. Cir. 1978) (en banc).

Even if exemption 2 were extended as the IRS proposes (Pet., p. 17), beyond what Congress intended, the Service's claim depends upon a showing that records containing TCMP statistical data are a "law enforcement manual," the disclosure of which would "significantly assist those engaged in criminal activity." The fact is that the TCMP data base is not a manual or set of personnel instruction or rules—law enforcement or otherwise. Moreover, there is no evidence to support the claim that release of TCMP data would enable anyone to commit a crime. The agency's exemption 2 claim is thus without merit.

### C. *Even if the Service's Legal and Factual Arguments Concerning Exemptions 2 and 7(E) Were Correct, the Claims Do Not Apply to the TCMP Data At Issue Here, Since Current DIF Formulae Are Based on Subsequent Data Not Requested by the Longs.*

Finally, even if the Service's new claims concerning harm caused by disclosure of DIF formulae were true and exemption 2 or 7(E) covered such records, the claims do not apply to the TCMP data at issue here, since current DIF formulae are based on subsequent data not requested by the Longs.

The case only concerns data from Phase II of the TCMP and early cycles of Phase III (individuals) and Phase IV (small corporations), I R. 20. Phase II was a survey of delinquent businesses that failed to file tax returns and, consequently, it has nothing to do with selecting returns for audit, with DIF formulae or otherwise. I R. 21-22; III R. 766. DIF formulae have been developed with data from



certain Phase III and Phase IV cycles, but they must be updated every three years to compensate for changes in (1) tax laws, regulations and interpretations; (2) filing patterns; (3) reporting characteristics; and (4) economic factors. III R. 766; *TCMP Handbook*, IRS Document 6457 (Sept. 1977) p. III-3, V. Since DIF formulae are changed every three years as new TCMP cycles are completed (*id.*), the cycles of Phases III and IV at issue here, 1974 returns at the latest (I R. 20), were not used to develop the current DIF formulae.[11] *TCMP Handbook, supra.*

Since the specific TCMP data at issue here are not the data utilized in developing the current DIF formulae, the Service's arguments to this Court are inapplicable. Therefore, even if the arguments in the petition had some merit, they do not apply to this case.

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11. It appears that 1979 individual returns will be processed utilizing DIF formulae developed with the use of Phase III, Cycle 5 data, but these returns must be filed by April 15, 1980. 1980 returns will be processed in 1981 with the use of DIF formulae changed on the basis of data from Cycle 6. *TCMP Handbook*, p. III-3. The Longs do not seek Cycle 6 data in this case.

## CONCLUSION

The question stated in the petition was neither raised nor addressed in the courts below, and it is not presented by the record. The Service's arguments are dependent upon extrarecord factual assertions. Instead of making new claims in this Court, the IRS should ask the district court, which has never issued a final judgment ordering disclosure, for leave to raise new defenses. If the IRS is dissatisfied with the district court's action, it can appeal the final judgment. Then, if this Court eventually considers the case, there will be a record on which to make an informed decision. The petition for certiorari should be denied.

If the Court does grant certiorari, oral argument should be heard before decision so that the Court may explore the true facts of this case and the extrarecord claims by the IRS.

Respectfully submitted,

STEPHEN K. STRONG
*Counsel for Respondents*

April 1, 1980



## APPENDIX A

### INTERNAL REVENUE MANUAL §125(18)

Taxpayer Compliance Measurement Program (TCMP)

125(18).1
Description of Program

(1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated.

(2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to impove the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems. Insofar as practicable, both the direct enforcement results and the indirect effects on the level of voluntary compliance shall be established and used in program evaluations and improvements. In these determinations, full use will be made of advanced analysis techniques, such as those employed in "operations research."

125(18).2
Specific Objectives of TCMP within the Enforcement Areas

(1) In the delinquent accounts area the program will furnish information to estimate the extent of and the reasons for delinquencies in payment, and the response obtained upon issuance of notices, by types of tax and by taxpayer groups. This information will be used to define and measure compliance levels in tax payment delinquencies, and changes therein from period to period, to identify taxpayer groups in which efforts to prevent delinguency should be concentrated; to improve collection procedures; and to study the relationships between tax payment delinquencies and economic indicators and to improve the forecosts of delinquent accounts workloads.

(2) In the delinquent returns area, canvassing in sample geographical areas will be utilized to estimate the extent and tax significance of delinquencies which exist in the filing of tax returns in order to measure levels and changes: to test the completeness of the Automatic Data Processing (ADP) Master file in terms of its coverage of business taxpayers, identification of the kinds of taxes for which they are required to file returns, and the tax significance of delinquencies not identified by ADP to determine the characteristics association with nonfiling, for use both in efforts to increase voluntary compliance and to improve enforcement procedures for securing delinquent returns.

(3) In the returns-filed area, thorough examination of designated samples of different types of returns filed, will provide the basis for estimating the total number of erroneous returns filed and the tax significance of these errors. Continuation of the program will make it possible to measure the changes in these dimensions. The information obtained will be used to make improvements in selection and examination procedures.



## APPENDIX B

### INTERNAL REVENUE MANUAL SUPPLEMENT 14RDD-4

July 2, 1962

Taxpayer Compliance Measurement Program

*Section 1. Purpose*

.01 This Supplement establishes the Taxpayer Compliance Measurement Program and provides the general guidelines under which the program plans will be developed and carried out.

.02 The general purpose is to integrate into one Reports System all essential information needed to optimize Federal tax administration.

.03 This includes bringing together and coordinating into one comprehensive system all information required to measure the dimensions of Federal tax administration workloads, their trends and projections; the related requirements, such as manpower, training, equipment and buildings; and the basic economics involved, such as costs, direct and indirect tax yields, and improvements in existing cost-yield ratios.

*Section 2. Program Objectives*

.01 In general, the program will measure in a coordinated and scientific manner:

(1) The size and nature of the total tax administration workload;

(2) the portion of the tax administration job that is accounted for by current operations;

(3) the portion of the tax administration job that is left undone, or the tax administration gap;

(4) the level of taxpayer compliance;

(5) changes in the level of taxpayer compliance, and whether compliance is increasing or decreasing under existing programs;

(6) the effectiveness with which current operations are being conducted; and,

(7) the portion of the tax administration gap that is worth closing.

.02 These measurements require three kinds of information:

(1) That existing essential information and related reports, and pending additions thereto, be reviewed and amended as soon as practicable to attain TCMP objectives;

(2) that new information requiring taxpayer contacts be obtained to complete the reporting system (especially to fill in on reasons for delinquent accounts, unknown return-filing delinquencies, and tax errors on timely filed and delinquent returns); and,

(3) that, wherever useful and practical, the measurements shall be made by advanced analysis techniques, such as those employed in "operations research"; and, to this end, new kinds of technicians shall be added who are professionally trained to do such advanced analyses.

.03 In general, all proposals for new TCMP information requiring either important direct costs to obtain, or likely to result in significant reductions in tax collections or additional taxes produced, shall be cleared with the Commissioner both as to the effective dates and general timing of the proposals, and as to the costs and tax yields involved. Also, after adoption, the continued collection of such information shall be periodically reviewed as to direct costs and tax yields involved in relation to benefits obtained, and recommendations shall be made to the Commissioner respecting their continuance.

.04 In the delinquent accounts area the program will furnish information to estimate the extent of and the reasons for delinquencies in payment, and the response obtained upon issuance of notices, by types of tax and by taxpayer groups. This information will be used to define and measure compliance levels in tax payment delinquencies, and changes therein from year to year; to identify taxpayer groups in which efforts to prevent delinquency should be concentrated; to impove collection procedures; and to study the relationships between tax payment delinquencies and economic indicators with a view to establishing the normal rates of delinquency by various taxpayer groups so as to determine whether the compliance levels are above or below normal, and to improve the forecasts of delinquent accounts workloads.



.05 In the delinquent returns area, canvassing in sample geographical areas will be utilized to estimate the extent and tax significance of delinquencies which exist in the filing of tax returns in order to measure the level of noncompliance and the changes therein from year to year; to test the completeness of the ADP Master File in terms of its coverage of business taxpayers, identification of the kinds of taxes for which they are required to file returns, and the tax significance of delinquencies not identified by ADP to determine the taxpayer group-identification characteristics associated with nonfiling, for use both in efforts to increase voluntary compliance and to improve enforcement procedures for securing delinquent returns.

.06 In the returns-filed area, thorough examinations of designated samples of returns filed will provide the basis for estimating the total number of erroneous returns filed and the tax significance of these errors. Continuation of the program will make it possible to measure the changes in these dimensions and thus determine whether the level of compliance in returns filed is increasing or decreasing. The information obtained will include the characteristics of taxpayers filing erroneous returns and the detailed nature of the tax errors, by types and sizes of tax errors, by designated issues, and will be used to make improvements in selection and examination procedures.

.07 In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as improved allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, and general tax administration policy and systems. The data also will be used to

help establish the portions of the tax administration gaps that are worth closing. Insofar as practiciable, both the direct tax results and the indirect effects on the level of voluntary compliance shall be established and used in program evaluations and improvements. In these determinations, full use should be made of advanced analysis techniques, such as those employed in "operations research."

*Section 3. Development of Plans, Coordination of Program, and Standards of Performance*

.01 The Office of Planning and Research will be primarily responsible for developing the TCMP plans, and for the overall measurements and analyses under Section 2.

.02 All other offices, including the Reports Division, will be primarily responsible for implementing the TCMP plans in their areas of responsibility, and for the detailed analyses leading to improvements in the Service's operations as generally outlined under Section 2. Existing functional responsibilities will be maintained under TCMP.

.03 The Service will place considerable dependence on the results of TCMP for the justification of existing programs and the needed changes therein to achieve improvements; and, for the determinations of the portions of tax administration gaps that can be economically closed. Consequently, the raw data produced and the analytical methods used must be of professional quality so as to establish confidence in and avoid controversy over the adequacy of the TCMP results. The following standards indicate the kind of quality desired and the areas to be controlled:

(1) If resources are available, sampling errors should be kept within limits of 5 to 10 percent at the national level for major groups of taxpayers whose compliance levels are to be measured over a long period of time.

(2) Systemic errors resulting from inadequate instructions, or instructions that have not been fully complied with by the various operating levels of the Service, must be kept to a mini-



mum by adequate indoctrination, monitoring, and nonacceptance (where feasible) of incorrect data and reports.

(3) Care must be exercised to minimize changes in reporting definitions and requirements so as to maintain a high internal consistency in the data produced over the years.

(4) The quality and intensity of enforcement activities required for TCMP must be carefully defined to permit reasonable consistency in the results of investigations and examinations over the years.

*Section 4. Implementation*

No action is required by field offices at this time. Specific plans and instructions will be subsequently issued in the form of manual supplements in each of the functional areas involved.

/s/ BERTRAND HARDING
*Acting Commissioner*